TEXAS REGISTER

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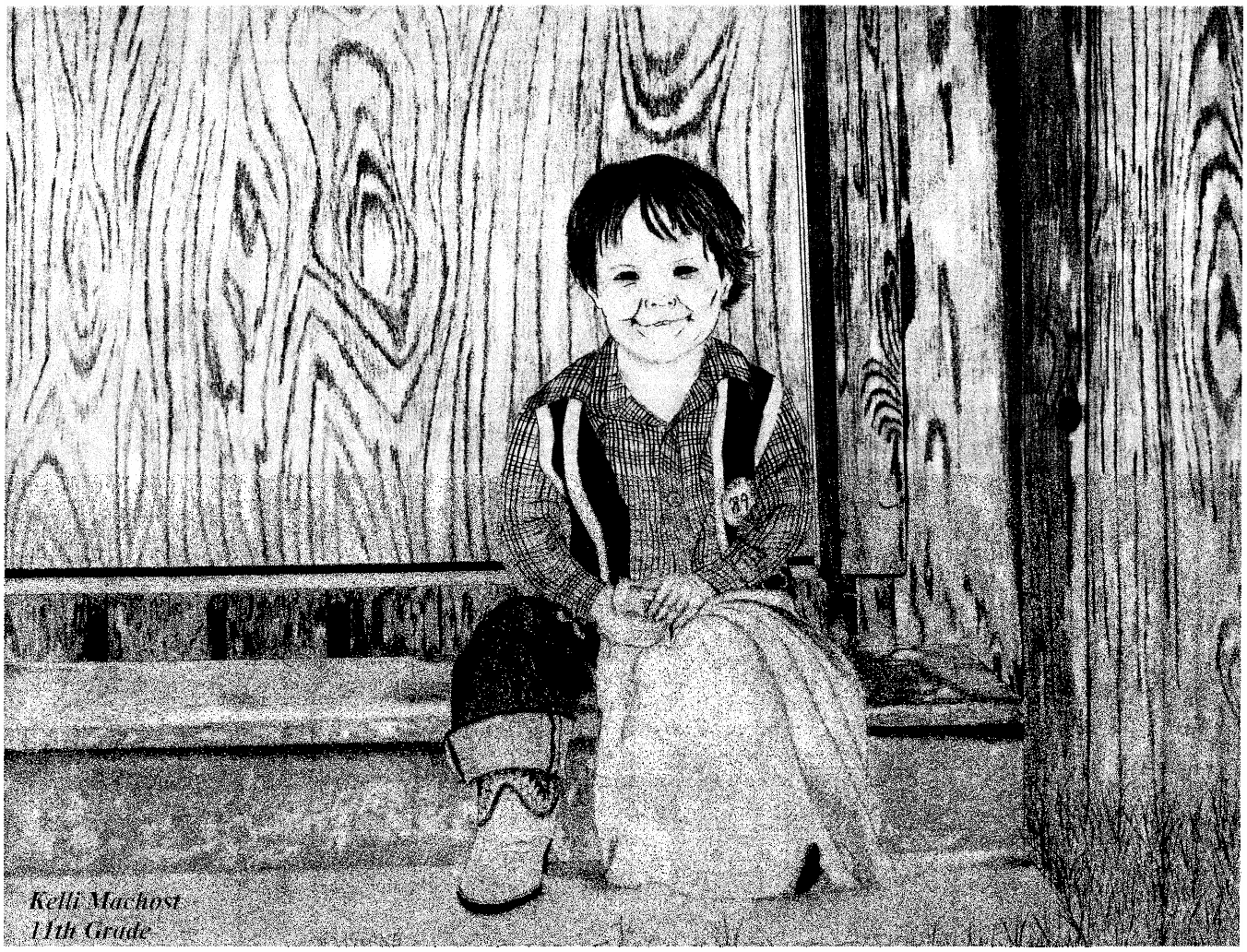

Kelli Machost
11th Grade

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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IN THIS ISSUE

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 463-5561 in Austin. For out-of-town callers our toll-free number is 800-226-7199. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/opinopen/opengovt.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.state.tx.us/

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for July 13, 2006

Appointed to the Texas Higher Education Coordinating Board for a term to expire August 31, 2007, Fred W. Heldenfels, IV of Austin (replacing Jerry Farrington who resigned).

Appointed to the Texas Board of Physical Therapy Examiners for a term to expire January 31, 2011, Robert Gary Gray of Midland (replacing Michael Grady Hines of Tyler whose term expired).

Appointed to the Texas Board of Physical Therapy Examiners for a term to expire January 31, 2011, Daniel Reyna of Waco (replacing George Scott, Jr. of Lubbock who is deceased).

Appointed to the North Central Texas Regional Review Committee for a term to expire January 1, 2008, Frank Corbett Howard, III of Celina (replacing Glen Whitley).

Appointed to the North Central Texas Regional Review Committee for a term to expire January 1, 2008, Kevin Burns of Decatur (replacing Kyle Stephens).

Appointments for July 14, 2006

Appointed to the State Board for Educator Certification for a term to expire February 1, 2011, Christie Pogue of Buda (replacing James Windham of Houston whose term expired).

Appointed to the Texas Youth Commission for a term to expire August 31, 2011, Stephen Kurt Fryar of Brownwood (replacing Nicholas Serafy of Brownwood whose term expired).

Appointed to the Department of Information Resources for a term to expire February 1, 2007, Charles Bacarisse of Houston (replacing Larry Leibrock of Austin who resigned).

Rick Perry, Governor

TRD-200603788

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THE ATTORNEY GENERAL

Under provisions set out in the Texas Constitution, the Texas Government Code, Title 4, §402.042, and numerous statutes, the attorney general is authorized to write advisory opinions for state and local officials. These advisory opinions are requested by agencies or officials when they are confronted with unique or unusually difficult legal questions. The attorney general also determines, under authority of the Texas Open Records Act, whether information requested for release from governmental agencies may be held from public disclosure. Requests for opinions, opinions, and open records decisions are summarized for publication in the *Texas Register*. The attorney general responds to many requests for opinions and open records decisions with letter opinions. A letter opinion has the same force and effect as a formal Attorney General Opinion, and represents the opinion of the attorney general unless and until it is modified or overruled by a subsequent letter opinion, a formal Attorney General Opinion, or a decision of a court of record. You may view copies of opinions at http://www.oag.state.tx.us. To request copies of opinions, please fax your request to (512) 462-0548 or call (512) 936-1730. To inquire about pending requests for opinions, phone (512) 463-2110.

Opinion Requests

RQ-0506-GA

Requestor:

Mr. C. Tom Clowe, Jr., Chair

Texas Lottery Commission

Post Office Box 16630

Austin, Texas 78761-6630

Re: Whether section 2001.160(c) of the Occupations Code restricts the transfer of a commercial bingo lessor license (Request No. 0506-GA)

Briefs requested by August 17, 2006

RQ-0507-GA

Requestor:

The Honorable John W. Segrest

McLennan County Criminal District Attorney

219 North 6th Street, Suite 200

Waco, Texas 76701

Re: Whether section 1704.304(c), Occupations Code, which prohibits solicitation of bail bond customers in a jail, extends to advertising or license information displayed on a license's vehicle in the jail's parking lot (Request No. 0507-GA)

Briefs requested by August 17, 2006

RQ-0508-GA

Requestor:

The Honorable Dennis Bonnen

Chair, Committee on Environmental Regulation

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether a municipality may operate a commercial compost/mulch business that sells its products outside municipal boundaries (Request No. 0508-GA)

Briefs requested by August 17, 2006

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200603793
Stacey Schiff
Deputy Attorney General
Office of the Attorney General
Filed: July 18, 2006

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 2. TEXAS ETHICS COMMISSION

CHAPTER 20. REPORTING POLITICAL CONTRIBUTIONS AND EXPENDITURES

SUBCHAPTER B. GENERAL REPORTING RULES

1 TAC §20.57

The Texas Ethics Commission proposes an amendment to §20.57, relating to the reporting of a political expenditure made by credit card.

Section 20.57 would clarify §254.035 of the Election Code, which relates in relevant part, to the reporting of a political expenditure made by credit card. Under the current version of §254.035, the manner in which an expenditure made by credit card is reported varies depending on the reporting period in which the charge was made. For the period covering the 30-day and 8-day pre-election reports, the expenditure is reported on the date the charge was made. As to all other reporting periods, an expenditure made by credit card is reported on the day the credit card bill is received, which is always after the charge was made. The proposed rule would clarify that, regardless of the period covered by a report, it is permissible to report an expenditure made by credit card on the date the charge was made.

David A. Reisman, Executive Director, has determined that for each year of the first five years that the rule is in effect there will be no fiscal implication for the state and no fiscal implication for local government as a result of enforcing or administering the rule as proposed. Mr. Reisman has also determined that the rule will have no local employment impact.

Mr. Reisman has also determined that for each year of the first five years the rule is in effect, the anticipated public benefit will be clarity in what is required by the law.

Mr. Reisman has also determined there will be no direct adverse effect on small businesses or micro-businesses because the rule does not apply to single businesses.

Mr. Reisman has further determined that there are no economic costs to persons required to comply with the rule.

The Texas Ethics Commission invites comments on the proposed rule from any member of the public. A written statement should be mailed or delivered to Natalia Luna Ashley, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, or by facsimile (FAX) to (512) 463-5777. A person who wants to offer spoken comments to the commission concerning the proposed rule may do so at any commission meeting during the agenda item "Communication to the Commission from the Public" and during the public comment period at a commission meeting when the commission considers final adoption of the proposed rule. Information concerning the date, time, and location of commission meetings is available by telephoning (512) 463-5800 or, toll free, (800) 325-8506.

The amendment is proposed under Government Code, Chapter 571, §571.062, which authorizes the commission to adopt rules concerning the laws administered and enforced by the commission.

The proposed amendment affects §254.035 of the Election Code.

§20.57. Time of Making Expenditure.

(a) The date of a political expenditure is the date the amount is readily determinable by the person making the expenditure, except as provided by subsection (b) of this section.

(b) If under normal business practices, the amount of an expenditure is not known or readily ascertainable until receipt of a periodic bill, the date of the expenditure is the date the bill is received. Examples of expenditures to which this subsection is applicable are expenditures for use of electricity or for long-distance telephone calls.

(c) A political expenditure by credit card made during the period covered by a report required to be filed under Section 254.064(b) or (c), 254.124(b) or (c), or 254.154(b) or (c) of the Election Code, must be included in the report for the period during which the charge was made, not in the report for the period during which the statement from the credit card company was received.

(d) A political expenditure by credit card made during a period not covered by a report listed under subsection (c) of this section, must be included in the report for the period during which:

(1) the charge was made; or

(2) the person receives the credit card statement that includes the expenditure.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 17, 2006.

TRD-200603777
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Earliest possible date of adoption: August 27, 2006
For further information, please call: (512) 463-5800

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CHAPTER 24. RESTRICTIONS ON CONTRIBUTIONS AND EXPENDITURES APPLICABLE TO CORPORATIONS AND LABOR ORGANIZATIONS

1 TAC §24.14

The Texas Ethics Commission proposes new §24.14, regarding the use of corporate funds to deliver a political contribution.

Section 24.14 would provide that it is permissible for a corporation to make expenditures to deliver a political contribution.

David A. Reisman, Executive Director, has determined that for each year of the first five years that the rule is in effect there will be no fiscal implication for the state and no fiscal implication for local government as a result of enforcing or administering the rule as proposed. Mr. Reisman has also determined that the rule will have no local employment impact.

Mr. Reisman has also determined that for each year of the first five years the rule is in effect, the anticipated public benefit will be clarity in what is allowed by the law.

Mr. Reisman has also determined there will be no direct adverse effect on small businesses or micro-businesses because the rule does not apply to single businesses.

Mr. Reisman has further determined that there are no economic costs to persons required to comply with the rule.

The Texas Ethics Commission invites comments on the proposed rule from any member of the public. A written statement should be mailed or delivered to Natalia Luna Ashley, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, or by facsimile (FAX) to (512) 463-5777. A person who wants to offer spoken comments to the commission concerning the proposed rule may do so at any commission meeting during the agenda item "Communication to the Commission from the Public" and during the public comment period at a commission meeting when the commission considers final adoption of the proposed rule. Information concerning the date, time, and location of commission meetings is available by telephoning (512) 463-5800 or, toll free, (800) 325-8506.

The new section is proposed under Government Code, Chapter 571, §571.062, which authorizes the commission to adopt rules concerning the laws administered and enforced by the commission.

The new section affects §253.100 of the Election Code.

§24.14. Administrative Expenditure.

An expenditure made by a corporation to deliver a political contribution is an administrative expenditure for purposes of §253.100 of the Election Code and §24.13 of this title (relating to Expenditures for a General-Purpose Committee).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 17, 2006.

TRD-200603776

Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Earliest possible date of adoption: August 27, 2006
For further information, please call: (512) 463-5800

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 19. QUARANTINES AND NOXIOUS PLANTS

SUBCHAPTER A. GENERAL QUARANTINE PROVISIONS

4 TAC §19.2

The Texas Department of Agriculture (the department) proposes an amendment to §19.2, concerning the use of methyl bromide in production of forest seedlings. The amendment is made to recognize methyl bromide as an official control treatment in production of forest seedlings. There are five nurseries in the state that produce conifer and hardwood seedlings on 196 acres. This acreage is treated with methyl bromide prior to seeding to ensure production of quality pest and disease-free seedlings. While most of these seedlings are used for forestation in Texas, some are shipped to other states. Managers of these nurseries have asked the department to recognize methyl bromide as an official control treatment. This recognition by a state agency would fulfill the United States Environmental Protection Agency's requirement of Quarantine Applications use defined in Title 40, Code of Federal Regulations, Section 82.3, related to the protection of stratospheric ozone. Furthermore, the Quarantine Applications allow for the use of methyl bromide for managing plant pests and diseases, which are not present in the state or if present, they are not widely distributed and are officially controlled.

The signatories to the Vienna Convention on the protection of the ozone layer (1987 Montreal Protocol) have recognized methyl bromide as one of the compounds that depletes the ozone layer. The United States is a party to this protocol, which provides a timetable, to reduce and eventually eliminate man-made ozone-depleting substances, including methyl bromide. This protocol requires a phase-out of methyl bromide production and consumption in developing countries, including the United States, by the year 2005 and in the developing countries by the year 2015. However, the protocol exempts quarantine and pre-shipment (QPS) uses of methyl bromide from the phase-out requirements to prevent the spread of plant pests and diseases.

The amendment to §19.2 allows the department to issue a phytosanitary certificate or a permit for intrastate and interstate movement of forest tree seedlings and denotes preference for the use of methyl bromide to produce pest and disease free forest seedlings.

Dr. Shashank Nilakhe, state entomologist, has determined that for the first five-year period the proposed amendment is in effect, there is no anticipated fiscal impact on state or local government as a result of administration and enforcement of the amended section, as proposed.

Dr. Nilakhe has also determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the amended section will be that the amendment will assist in continual production of pest and disease free forest tree seedlings and facilitate intrastate and interstate movement of these seedlings. There will be no cost to micro-businesses or small businesses that will be required to comply with the proposed amendment because nurseries already use methyl bromide to produce pest and disease free forest tree seedlings.

Comments on the proposal may be submitted to Dr. Shashank Nilakhe, State Entomologist, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The amendment is proposed under the Texas Agriculture Code, §71.001, which authorizes the department to establish quarantines against out-of-state diseases and pests; §71.002, which authorizes the department to establish quarantines against in-state diseases and pests; and §71.007, which authorizes the department to adopt rules as necessary to protect agricultural and horticultural interests, including rules to provide for specific treatment of a grove or orchard or of infested or infected plants, plant products, or substances.

The code affected by this proposal is the Texas Agriculture Code, Chapter 71.

§19.2. Inspection Certificates.

(a) - (e) (No change.)

(f) A phytosanitary certificate or a permit may be issued by an inspector for intrastate and interstate shipments of conifer and hardwood seedlings to verify that they are free of pests and diseases, including cogongrass, *Imperata cylindrical*; tropical soda apple, *Solanum viarum*; and sudden oak death, *Phytopthora ramorum*. To ensure pest and disease-free plant material, the preferred method of treatment is fumigation using methyl bromide in seedling plant beds prior to seeding.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 17, 2006.

TRD-200603772
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: August 27, 2006
For further information, please call: (512) 463-4075

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TITLE 7. BANKING AND SECURITIES

PART 8. JOINT FINANCIAL REGULATORY AGENCIES

CHAPTER 153. HOME EQUITY LENDING

7 TAC §153.22

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Finance Commission of Texas or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Finance Commission of Texas and the Texas Credit Union Commission ("commissions") jointly re-propose the repeal of §153.22 relating to home equity lending under Texas Constitution, Article XVI, §50(a)(6). A prior proposed repeal of §153.22, published in the March 3, 2006, issue of the *Texas Register* (31 TexReg 1393), is withdrawn in this issue of the *Texas Register*. Section 153.22 was re-proposed for comment in the June 14, 2006, issue of the *Texas Register*.

Harold Feeney, Credit Union Commissioner, on behalf of the Texas Credit Union Commission and Leslie L. Pettijohn, Consumer Credit Commissioner, on behalf of the Finance Commission of Texas have determined that for the first five-year period the repeal as proposed will be in effect, there will be no fiscal implications for state or local government as a result of administering or enforcing the repeal.

Commissioner Feeney and Commissioner Pettijohn also have determined that for each year of the first five years the repeal as proposed will be in effect, the public benefit anticipated as a result of the repeal will be clearer interpretations for lenders and consumers. The commissions proposed a new interpretation to seek comment on replacing existing §153.22, which was published in the March 3, 2006, issue of the *Texas Register* (31 TexReg 1393). The commissions received comments on the new proposal which prompted staff to recommend certain changes in the language of the proposed new §153.22. The commissions believe that further public input would be beneficial and have decided to republish the interpretation for further comment. Consequently this repeal is being re-proposed as well. There is no anticipated cost to persons who are required to comply with the repeal as proposed. There will be no adverse economic effect on small or micro businesses. There will be no effect on individuals required to comply with the repeal as proposed.

Written comments on the re-proposed repeal may be submitted in to Harold Feeney, Commissioner, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699, or to Sealy Hutchings, General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by email to commissioner@tcud.state.tx.us or sealy.hutchings@occc.state.tx.us. To be considered, a written comment must be received on or before the 30th day after the date the proposed repeal is published in the *Texas Register*. At the conclusion of the 30th day after the proposed repeal is published in the *Texas Register*, no further written comments will be considered or accepted by the commissions.

The interpretation repeal is re-proposed pursuant to Texas Finance Code, §§11.308 and 15.413 (as added by Acts 2003, 78th Legislature, Chapter 1207, §2), which separately and independently authorize each commission to issue interpretations of the Texas Constitution, Article XVI, §50(a)(5)-(7), (e)-(p), (t), and (u), subject to Texas Government Code, Chapter 2001.

The Texas Constitution, Article XVI, §50(a)(6) is affected by the re-proposed repeal.

§153.22. Copies of Documents: Section 50(a)(6)(Q)(v).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 13, 2006.

TRD-200603740
Leslie L. Pettijohn
Commissioner
Joint Financial Regulatory Agencies
Earliest possible date of adoption: August 27, 2006
For further information, please call: (512) 936-7640

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 33. STATEMENT OF INVESTMENT OBJECTIVES, POLICIES, AND GUIDELINES OF THE TEXAS PERMANENT SCHOOL FUND

19 TAC §§33.5, 33.15, 33.25, 33.35

The State Board of Education (SBOE) proposes amendments to §§33.5, 33.15, 33.25, and 33.35, concerning the Texas Permanent School Fund (PSF). The rules establish investment objectives, policies, and guidelines for the PSF. The proposed amendments would primarily update the rules to incorporate recommended changes to the Long-Term Strategic Asset Allocation Plan of the Permanent School Fund.

The Texas Education Code (TEC), §7.102(c)(31), states that the SBOE may invest the PSF within the limits of the authority granted by the Texas Constitution, Article VII, §5, and the TEC, Chapter 43.

The Long-Term Strategic Asset Allocation Plan of the PSF was originally adopted by the SBOE on October 8, 1994. The SBOE has amended, discussed, and reviewed the plan as needed since its original adoption. During its April 28, 2006, meeting, the SBOE directed the development of five work plans for consideration at the July 2006 meeting using a proposed asset allocation as a general guideline for the SBOE to adopt changes to the current plan. At its April 2006 meeting, the SBOE agreed to schedule a work session prior to the July 2006 meeting to review and discuss various background issues related to the asset allocation plan of the PSF. The work session was held on June 14, 2006. Direction given by the SBOE during the June 14 work session was incorporated into the proposed amendments considered during the July 2006 SBOE meeting. Changes to the asset allocation plan were approved by the SBOE on July 7, 2006. The following proposed amendments approved for first reading and filing authorization by the SBOE on July 7, 2006, would update 19 TAC Chapter 33 to incorporate changes made to the asset allocation plan. In addition, the proposed amendments include recommended adjustments to the code of ethics and the securities lending guidelines.

Section 33.5, Code of Ethics, would be amended to include reference to an additional statute relating to ethics and disclosure requirements and to standardize reporting dates to match those of the state. Specifically, reference to Texas Government Code, Chapter 2263, would be added to subsection (e)(1); reporting periods and due dates for expenditure and disclosure reports would be modified in subsection (l)(2)(J), (K), and (M); and clarification about transactions between PSF service providers and/or consultants would be added in subsection (n). The expenditure report form, adopted in rule in subsection (l)(2)(J), would also be amended to reflect the changes in reporting periods.

Section 33.15, Objectives, would be amended to include the new asset class objectives. An update to reflect the name change for the performance presentation standards would be made in subsection (c)(2). Subsection (c) would also be modified to add new paragraphs (8) - (11) for new asset class objectives relating to real estate, private equity, absolute return, and real return funds, respectively. Numbering and cross references would be modified accordingly. Subsection (d)(3) would also be revised to include these new objectives.

Section 33.25, Permissible and Restricted Investments and General Guidelines for Investment Managers, would be amended to accommodate the new asset classes and to clarify language on existing guidelines. Subsection (a) would be modified to add the new asset class objectives relating to real estate, private equity, absolute return, and real return funds as permissible investments, with appropriate renumbering and technical edits as necessary. Language related to government sponsored agencies would be clarified in subsection (b)(10). Language to reflect current Index guidelines, including rating by Fitch, would be updated in subsection (b)(13). Language in subsection (c)(2)(D) would permit a varying degree of discretionary authority for specialist advisors.

Section 33.35, Guidelines for the Custodian and the Securities Lending Agent, would be amended to include the extension of the maturity of floating rate notes to three years and to add language to strengthen the program in general. Modifications throughout paragraph (2)(H) would be made to update, correct, and strengthen specific guidelines applicable to the PSF securities lending program.

In accordance with Texas Education Code (TEC), §43.0031(c), a copy of the proposed amendment to 19 TAC §33.5 will be provided to the Texas Ethics Commission and the state auditor for review and comment. Comments from the commission or state auditor will be presented to the SBOE for consideration prior to final adoption.

Holland Timmins, executive administrator and chief investment officer of the Texas Permanent School Fund, has determined that for the first five-year period the amendments are in effect there will be no fiscal implications for state or local government (TEA and school districts) as a result of enforcing or administering the amendments.

Mr. Timmins has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amendments would be provisions supporting the management and investment of the PSF. The objective of the changes is to revise the asset allocation to improve the total return and reduce the risk of the portfolio which would support a higher distribution. The distribution of the PSF will flow to the school districts and reduce the tax burden to the public and the state of Texas. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed amendments.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. All requests for a public hearing on the proposed amendments submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar

days after notice of the proposal has been published in the *Texas Register*.

The amendments are proposed under the Texas Education Code, §7.102(c)(31) and (33), which authorize the State Board of Education to invest the PSF within the limits of the authority granted by the Texas Constitution, Article VII, §5, and to adopt rules as necessary for the administration of the program; and §43.0031, which authorize the State Board of Education to adopt and enforce an ethics policy that provides standards of conduct relating to the management and investment of the Permanent School Fund; and the Texas Constitution, Article VII, §5(f).

The amendments implement the Texas Education Code, §7.102(c)(31) and (33), and §43.0031, and the Texas Constitution, Article VII, §5(f).

§33.5. Code of Ethics.

(a) - (d) (No change.)

(e) General ethical standards.

(1) SBOE Members and PSF Service Providers must comply with all applicable laws, specifically, the following statutes: Texas Government Code, Chapter 2263 (Ethics and Disclosure Requirements for Outside Financial Advisors and Service Providers), §825.211 (Certain Interests in Loans, Investments, or Contracts Prohibited), §572.051 (Standards of Conduct for Public Servants), §552.352 (Distribution of Confidential Information), §572.058 (Private Interest in Measure or Decision; Disclosure; Removal from Office for Violation), §572.054 (Representation by Former Officer or Employee of Regulatory Agency Restricted), §572.002 (General Definitions), §572.004 (Definition: Regulation), and Chapter 305 (Registration of Lobbyists); and Texas Penal Code, Chapter 36 (Bribery, Corrupt Influence, and Gifts to Public Servants) and Chapter 39 (Abuse of Office, Official Misconduct). The omission of any applicable statute listed in this paragraph does not excuse violation of its provisions.

(2) - (8) (No change.)

(f) - (k) (No change.)

(l) Gifts and entertainment.

(1) (No change.)

(2) Acceptance of gifts.

(A) - (I) (No change.)

(J) A PSF Service Provider shall file a report annually on April [~~January~~] 15 of each year on the expenditure report provided in this subsection entitled "Report of Expenditures of Persons Providing Services to the State Board of Education Relating to the Management and Investment of the Permanent School Fund." The report shall be for the time period beginning on January 1 [~~December 1 of the previous year~~] and ending on December 31 of the previous year [~~November 30 of the current year~~]. The expenditure report must describe in detail any expenditure of more than $50 made by the person on behalf of:

(i) - (ii) (No change.)

(iii) an employee of the TEA or of a nonprofit corporation created under the Texas Education Code, §43.006.
Figure: 19 TAC §33.5(l)(2)(J)(iii)

(K) A PSF Service Provider shall file a report annually with the TEA's PSF office, in the format specified by the PSF staff, on or before April [~~January~~] 15 of each year. The report will be deemed to be filed when it is actually received. The report shall be for the time period beginning on January 1 [~~December 1 of the previous year~~] and ending on December 31 of the previous year [~~November 30 of the current year~~]. It shall list any individuals who served in any of the following capacities at any time during the reporting period:

(i) - (v) (No change.)

(L) (No change.)

(M) Each SBOE Member and each PSF Service Provider shall, no later than April [~~January~~] 15, file an annual report affirmatively disclosing any violation of this code of ethics known to that person during the time period beginning January 1 and ending December 31 of the previous year which has not previously been disclosed in writing to the commissioner of education for distribution to all board members, or affirmatively state that the person has no knowledge of any such violation. For purposes of this subparagraph only, "SBOE Member" means only the individual elected official.

(m) (No change.)

(n) Transactions between PSF Service Providers and/or consultants.

(1) (No change.)

(2) PSF Service Providers and/or consultants to the SBOE who provide advice regarding investment and management of the PSF shall report to the SBOE on a quarterly basis all investment transactions or trades and any fees or compensation paid or received in connection with the transactions or trades with another PSF Service Provider or a person who acts as a consultant to the SBOE regarding investment and management of the PSF.

(o) - (s) (No change.)

§33.15. Objectives.

(a) - (b) (No change.)

(c) Investment rate of return and risk objectives.

(1) (No change.)

(2) Investment rates of return shall adhere to the Chartered Financial Analyst (CFA) Institute Global Investment Performance Standards (GIPS) [~~Association for Investment Management and Research Performance Presentation Standards (AIMR-PPS)~~] guidelines in calculating and reporting investment performance return information.

(3) - (7) (No change.)

(8) The objective of the real estate fund shall be to earn, over time, an average annual total rate of return that meets or exceeds that of a representative benchmark index in U.S. dollars, combining income and capital appreciation, while maintaining an acceptable risk level compared to that of the representative benchmark index.

(9) The objective of the private equity fund shall be to earn, over time, an average annual total rate of return that meets or exceeds that of a representative benchmark or a targeted internal rate of return in U.S. dollars, combining income and capital appreciation, while maintaining an acceptable risk level compared to that of the representative benchmark.

(10) The objective of the absolute return fund shall be to earn, over time, an average annual total rate of return that meets or exceeds that of a representative benchmark index in U.S. dollars, combining income and capital appreciation, while maintaining an acceptable risk level compared to that of the representative benchmark index.

(11) The objective of the real return fund shall be to earn, over time, an average annual total rate of return that meets or exceeds

that of a representative benchmark index in U.S. dollars, combining income and capital appreciation, while maintaining an acceptable risk level compared to that of the representative benchmark index.

(12) [~~(8)~~] The objective of the short-term cash fund shall be to provide liquidity for the timely payment of security transactions, while earning a competitive return. The expected return, over time, shall meet or exceed that of the representative benchmark index, while maintaining an acceptable risk level compared to that of the representative benchmark index.

(13) [~~(9)~~] Notwithstanding the risk parameters specified in paragraphs (4) - (12) [~~(4)~~ - ~~(8)~~] of this subsection, consideration shall be given to marginal risk variances exceeding the representative benchmark indices if returns are commensurate with the risk levels of the respective portfolios.

(d) Asset allocation policy.

(1) - (2) (No change.)

(3) The SBOE Committee on School Finance/Permanent School Fund, with the advice of the PSF investment staff, shall review the provisions of this section at least annually and, as needed, rebalance the assets of the portfolio according to the asset allocation rebalancing procedure specified in the PSF Investment Procedures Manual. The SBOE Committee on School Finance/Permanent School Fund shall consider the industry diversification and the percentage allocation [~~between fixed income and equity securities~~] within the following asset classes:

(A) - (B) (No change.)

(C) domestic fixed income; [~~and~~]

(D) real estate;

(E) private equity;

(F) absolute return;

(G) real return; and

(H) [~~(D)~~] cash.

(4) - (5) (No change.)

§33.25. Permissible and Restricted Investments and General Guidelines for Investment Managers.

(a) Permissible investments.

(1) - (2) (No change.)

(3) Real estate is considered to be investments in real properties, as well as investments in real estate related securities and real estate related debt. Common property types associated with real estate investments are, but not limited to, apartments, office buildings, retail centers, infrastructure, timberlands, and industrial parks.

(4) Private equity is considered to be, but not limited to, venture capital, buy-out investing, mezzanine financing, and distressed debt.

(5) Absolute returns are investments in a diversified bundle of primarily marketable investment strategies that seek positive returns, regardless of market direction.

(6) Real returns are investments that target a return that exceed the rate of inflation, measured by the Consumer Price Index (CPI), by a premium.

(7) [~~(3)~~] Cash equivalents are securities with maturities of less than or equal to one year that are considered to include interest bearing or discount instruments of the U.S. government or its agencies, money market funds, corporate discounted instruments, corporate-issued commercial paper, time deposits of U.S. or foreign banks, bankers acceptances, and fully collateralized repurchase agreements. Both U.S. and foreign offerings are permitted. All residual cash in the Texas Permanent School Fund (PSF) portfolio must be swept and invested on a daily basis.

(8) [~~(4)~~] Any form of investment or nonpublicly traded investment may be considered by the State Board of Education (SBOE) based on risk and return characteristics, provided the investment is consistent with PSF goals and objectives.

(9) [~~(5)~~] The SBOE [~~State Board of Education (SBOE)~~] may approve currency hedging strategies for the international portfolios and delineate the related procedures in the "Standards of Performance" section of the PSF Investment Procedures Manual.

(b) Prohibited transactions and restrictions. Unless the SBOE gives its written approval, the following prohibited transactions and restrictions apply for all PSF managers:

(1) - (9) (No change.)

(10) engaging in any purchasing transaction, after which the cumulative market value of fixed income securities or cash equivalent securities in a single corporation (excluding the U.S. government, [~~or~~] its federal agencies , and government sponsored enterprises) exceeds 2.5% of the PSF total market value or 5.0% of the manager's total portfolio market value;

(11) - (12) (No change.)

(13) purchasing any fixed income security not rated investment grade by at least two of the following ratings agencies: at least BBB- by Standard & Poor's, [~~and~~] Baa3 by Moody's, and BBB by Fitch, subject to the provisions in the PSF Investment Procedures Manual related to the fixed income portfolio mandates regarding quality and duration;

(14) - (20) (No change.)

(c) General guidelines for investment managers.

(1) (No change.)

(2) As fiduciaries of the PSF, investment managers shall discharge their duties solely in the interests of the PSF according to the prudent expert rule, engaging in activities that include the following.

(A) - (C) (No change.)

(D) Discretionary investment authority. Subject to the provisions of this chapter, any investment manager of marketable securities or other investments, retained by the PSF, shall have full discretionary investment authority over the assets for which the manager is responsible. Specialist advisors retained for alternative asset investments may have a varying degree of discretionary authority, which will be outlined in the respective management contract.

(d) (No change.)

§33.35. Guidelines for the Custodian and the Securities Lending Agent.

Completing custodial and security lending functions in an accurate and timely manner is necessary for effective investment management and accurate records.

(1) (No change.)

(2) A securities lending agent for the PSF shall have the following responsibilities.

(A) - (G) (No change.)

(H) Comply with restrictions on types of securities lending transactions or eligible investments of cash collateral or any other restrictions imposed by the SBOE or the PSF investment staff. Unless the SBOE gives its written approval, the following guidelines apply to the PSF Securities Lending Program. Cash collateral reinvestment guidelines must meet the following standards.

(i) Permissible investments.

(I) U.S. Government and U.S. Agencies, under the following criteria:

(-a-) - (-b-) (No change.)

(-c-) maximum three-year [~~397-day~~] maturity on floating rate, with maximum reset period of 90 days and use a standard repricing index such as London InterBank Offered Rate (LIBOR), Federal Funds, Treasury Bills, or commercial paper; and

(-d-) (No change.)

(II) Bank obligations, under the following criteria:

(-a-) time deposits with maximum 60-day maturity on fixed rate or three-year maturity for floating rate, with maximum reset period of 60 days and use a standard repricing index such as LIBOR, Federal Funds, Treasury Bills, or commercial paper;

(-b-) negotiable Certificates of Deposit with maximum 397-day maturity on fixed rate or three-year maturity for floating rate, with maximum reset period of 90 days and use a standard repricing index such as LIBOR, Federal Funds, Treasury Bills, or commercial paper;

(-c-) bank notes with maximum 397-day maturity on fixed rate or three-year [~~maximum 397-day~~] maturity on floating rate, with maximum reset period of 90 days and use a standard repricing index such as LIBOR, Federal Funds, Treasury Bills, or commercial paper;

(-d-) (No change.)

(-e-) banks with at least $25 billion in assets with a short-term rating of "Tier 1" as defined in clause (ii)(IV) of this subparagraph for fixed rate and AA2 and AA by Moody's Investor Service and Standard & Poor's Corporation for floating rate. In addition, placements can be made in branches within the following countries:

(-1-) - (-4-) (No change.)

(-f-) (No change.)

(III) - (IV) (No change.)

(V) Asset backed securities, under the following criteria:

(-a-) (No change.)

(-b-) maximum three-year [~~397-day~~] weighted average life on floating rate, with maximum reset period of 90 days and use a standard repricing index such as LIBOR, Federal Funds, Treasury Bills, or commercial paper; and [~~;~~]

(-c-) rated Aaa and AAA by Moody's Investor Service and Standard & [~~and~~] Poor's Corporation at time of purchase. One AAA rating may suffice if only rated by one Nationally Recognized Securities Rating Organization (NRSRO).

(VI) Corporate debt (other than commercial paper), under the following criteria:

(-a-) - (-b-) (No change.)

(-c-) maximum three-year [~~397-day~~] maturity on floating rate, with maximum rest period of 90 days and use a standard repricing index such as LIBOR, Federal Funds, Treasury Bills, or commercial paper;

(-d-) issuers or guarantor's short-term obligations must be rated "Tier 1" as defined in clause (ii)(IV) of this subparagraph for fixed rate and AA2 and AA by Moody's Investor Service and Standard & Poor's Corporation for floating rate; and

(-e-) (No change.)

(VII) Reverse repurchase agreements, under the following criteria:

(-a-) counterparty must be "Tier 1" rated as defined in clause (ii)(IV) of this subparagraph for fixed rate and AA2 and AA by Moody's Investor Service and Standard & Poor's Corporation for floating rate or be a "Primary Dealer" in Government Securities as per the New York Federal Reserve Bank;

(-b-) - (-c-) (No change.)

(-d-) collateral must be marked to market daily and maintained at the following margin levels;

(-1-) - (-2-) (No change.)

(-3-) corporate debt (other than commercial paper) at 105% rated at least AA2/AA or better by Moody's Investor Service and Standard & [~~and~~] Poor's Corporation at time of purchase;

(-e-) - (-g-) (No change.)

(VIII) Foreign sovereign debt, under the following criteria:

(-a-) any security issued by or fully guaranteed as to payment of principal and interest by a foreign government whose sovereign debt is rated AA2/AA or better by Moody's Investor Service and Standard & [~~and~~] Poor's Corporation at time of purchase. Securities must be delivered to Lending Agent or a third party under a Tri-Party agreement;

(-b-) - (-c-) (No change.)

(IX) (No change.)

(ii) Investment parameters.

(I) - (VI) (No change.)

(VII) Interest and principal only (IO, PO) stripped mortgages are not permitted.

(VIII) [~~(VII)~~] Mortgage backed securities are not permitted.

(IX) Complex derivative or structured securities, including, but not limited to, the following are not permitted:

(-a-) inverse floating rate notes;

(-b-) defined range floating rate notes;

(-c-) trigger notes; and

(-d-) set-up notes.

(I) - (J) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 17, 2006.

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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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For further information, please call: (512) 475-1497

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CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER C. GENERAL EDUCATIONAL DEVELOPMENT

19 TAC §§89.42, 89.43, 89.47

The State Board of Education (SBOE) proposes amendments to §§89.42, 89.43, and 89.47, concerning general educational development (GED). The rules provide for high school equivalency testing in the state, including the establishment of testing centers, eligibility requirements for the Texas Certificate of High School Equivalency and the GED Test, and requirements for issuance of the certificate.

Texas Education Code (TEC), §7.111, High School Equivalency Examinations, requires the SBOE to provide for the administration of high school equivalency examinations, including administration by the adjutant general's department for specified students. TEC, §7.111, also requires the SBOE by rule to establish and require payment of a fee as a condition to the issuance of a high school equivalency certificate and a copy of the scores of the examinations. The fee must be reasonable and designed to cover the administrative costs of issuing the certificate and a copy of the scores. In accordance with statute, the SBOE rules in 19 TAC Chapter 89, Subchapter C, address and implement statute.

The proposed amendments to 19 TAC Chapter 89, Subchapter C, would incorporate provisions relating to legislation passed during the 79th Texas Legislature, 2005, and would provide necessary clarifications and updates identified during the recent statutorily-required review of rules in 19 TAC Chapter 89, as follows.

In 19 TAC §89.42, Official Testing Centers, proposed changes would be made to align provisions in the rule with the American Council of GED Testing Services (GEDTS) program and contract updates. Affected provisions include the following changes. Subsection (a) would include changes relating to the location of testing centers, number of copies of the annual contract that must be sent to the center, and required signatures on the contract. Subsection (b) would include changes to remove the requirement to maintain test records permanently. Subsection (d) would include changes to add inventory requirements of tests administered at addendum sites. Subsection (g) would include changes to modify required documentation for official testing centers and add assurances that must be provided to the GEDTS. The proposed amendment to 19 TAC §89.42 would also include a technical correction in subsection (e).

In addition, the proposed amendment to 19 TAC §89.42 would modify subsection (c) to clarify the educational requirements for chief examiners that are designated by institutions of higher learning to align with those currently required of school districts and ESCs.

A school district and ESC must designate a certified counselor to serve as a chief examiner. According to the State Board for Educator Certification (SBEC) rule in 19 TAC Chapter 239, Student Services Certificates, Subchapter A, School Counselor Certificate, certification as a Kindergarten-Grade 12 school counselor requires successful completion of an approved Texas school counselor program, two years of classroom teaching experience, the school counselor exam, and a master's degree. This school counselor certification includes the functional areas of regular education school counselor, vocational counselor, and special education counselor.

Currently, 19 TAC §89.42(c) states that the administrative officer of an institution of higher learning must designate a professional person with a background in testing and counseling to serve as the chief examiner; however, the rule does not specify or clarify the educational requirements of a "professional person," although it is implied by the school district or ESC designation of a "certified counselor" as the chief examiner. The proposed amendment in 19 TAC §89.42(c) would provide this clarification.

In 19 TAC §89.43, Eligibility for a Texas Certificate of High School Equivalency, the proposed amendment would incorporate provisions relating to legislation passed during the 79th Texas Legislature, 2005, that provides for Seaborne ChalleNGe Corp members who are 16 years of age to be administered the GED examination. Subsection (a)(2) would be reorganized for clarity.

In 19 TAC §89.47, Issuance of the Certificate, the proposed amendment made in subsection (c) would establish that the $5.00 paid for processing a request for a duplicate GED certificate would be nonrefundable. Currently, individuals are required to pay a fee of $5.00 for each request for a duplicate certificate. In some cases, requests are received from individuals who either (1) did not pass the GED, and thus, no certificate exists or (2) took the GED in another state. The Texas Education Agency (TEA) incurs costs for personnel and other operating expenses relating to processing these requests regardless of whether the individual actually has a GED certificate on record at the TEA. The TEA incurs additional costs to return the $5.00 fee to such individuals. The proposal to make the fee nonrefundable would establish a cost savings for the use of public resources.

Ernest Zamora, associate commissioner for support services, has determined that for the first five-year period the amendments are in effect there will be fiscal implications for the state as a result of enforcing or administering the amendments. A savings of approximately $6,000 would be realized for each of the first five years by reducing the amount of time spent by personnel in three different departments that are currently tasked with processing refunds. In addition, establishing a $5.00 nonrefundable fee would result in an estimated increase in revenue of $3,000 for each of the next five fiscal years. This estimate is based upon an average of 600 requests for refunds processed each year in fiscal years 2004 and 2005 to return the $5.00 fee for certificates not on record with the TEA. There will be no fiscal implications for local government (school districts or institutions of higher learning) as a result of the proposed amendments.

Dr. Zamora has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amendments would be alignment of provisions with national program and contract standards, clarification of the education standards for chief examiners, and establishment of a cost savings for the use of public resources. In addition, students enrolled in the Seaborne ChalleNGe Corps who are at least 16 years old would benefit by being eligible to test for the certificate of high school equivalency in accordance with SBOE rules. There will be no effect on small businesses. There is anticipated economic cost to persons who are required to comply with the proposed amendments. An individual who requests a duplicate certificate that is not on record with the TEA would not be refunded the $5.00.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education

Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. All requests for a public hearing on the proposed amendments submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

The amendments are proposed under the Texas Education Code, §7.111, which authorizes the SBOE to provide for the administration of high school equivalency examinations and to by rule establish and require payment of a fee as a condition to the issuance of a high school equivalency certificate and a copy of the scores of the examinations. The statute further states that the fee must be reasonable and designed to cover the administrative costs of issuing the certificate and a copy of the scores.

The amendments implement the Texas Education Code, §7.111.

§89.42. Official Testing Centers.

(a) When authorized by the Texas Education Agency (TEA), official testing centers shall be established by annual contract with an accredited school district, institution of higher learning, or education service center (ESC). The testing center must be located at a high school in an accredited district, [~~an adult learning center,~~] an accredited institution of higher learning, or ESC. The chief administrative officer of a school, institution of higher learning, or ESC desiring to provide the General Educational Development (GED) testing service to residents in the community must request authorization to do so from TEA. If the need for a testing center in the location exists, the appropriate agency official, in writing, shall inform the American Council on Education that the establishment of an official testing center is authorized at that particular institution. The center shall be sent [~~four copies of~~] an annual contract, together with order forms and other material, relating to the operation of the testing center. The contract forms must be signed by the chief administrative officer of the school, institution of higher learning, or ESC, and the chief examiner.

(b) The chief administrative officer of the school, institution of higher learning, or ESC at which an official testing center is established must agree [~~to maintain test records permanently,~~] to provide appropriate storage for restricted test materials[~~,~~] and to provide a suitable place for administering the test. Each center is responsible for selecting and ordering test materials.

(c) The administrative officer of a school district or ESC must designate a certified counselor, and the administrative officer of an institution of higher learning must designate a professional person with a master's degree with a background in teaching, training, testing , or [~~and~~] counseling, to serve as chief examiner. The person designated as chief examiner shall not be involved in preparing persons for the examinations. The chief administrative officer must obtain prior authorization from TEA to change the chief examiner or the location of a testing center. The person designated as chief examiner must attend annual training conducted by TEA.

(d) A testing center may transport restricted test material to correctional facilities, health facilities, or schools if authorization to do so has been obtained. The chief administrative officer of an institution housing an official testing center and the administrator of the correctional facility, health facility, or school must request authorization to provide the testing services from TEA. Only the exact number of tests plus one needed at a test session may be transported to the addendum site. Testing services at correctional or health facilities shall be limited to inmates or patients of the facility, and the tests must be administered by an employee of the school district, institution of higher learning, or ESC housing the test center. To maintain the integrity of the test, a complete inventory of all secure testing materials shall be conducted:

(1) before leaving the official GED testing center;

(2) upon arrival at the addendum site;

(3) immediately before and after the test administration;

(4) before departure from the addendum site; and

(5) upon return to the official GED testing center.

(e) The authorization to function as an official testing center may be withdrawn by TEA when a center has failed to maintain the integrity of the testing program. The TEA may suspend testing at a center if restricted test material is reported missing or if conditions reported by the TEA site [~~monitoring~~] visit indicate that the testing center is in violation of State Board of Education (SBOE) rules or requirements of the American Council on Education.

(f) An official testing center may charge a fee for test administration. The amount of the fee shall be determined by the administration or board of the school district, institution of higher learning, or ESC.

(g) The administration or board of an institution housing an official testing center shall have a written policy concerning the operation of the center , a written emergency plan, and a testing schedule. [~~This policy must provide that the chief administrative officer or chief examiner of the testing center shall prepare an annual report concerning the center for review by the administration or board of each institution. The report must include the number of tests administered and fees received.~~] Each official testing center must provide the following assurances to the GED Testing Service:

(1) appropriate resources;

(2) suitable physical facilities;

(3) adequate staffing;

(4) full testing support services;

(5) cooperation with the GEDTS;

(6) financial management; and

(7) test security.

§89.43. Eligibility for a Texas Certificate of High School Equivalency.

(a) An applicant for a certificate of high school equivalency shall meet the following requirements.

(1) Residence. The applicant must be a resident of Texas or a member of the United States armed forces stationed at a Texas installation.

(2) Age. [~~The applicant must be 18 years old. An applicant who is 17 years of age is eligible with parental or guardian consent. An applicant who is 17 years of age must present written permission signed by the applicant's parent or guardian. An applicant who is 17 years of age and married, who has entered military service, who has been declared an adult by the court, or who has otherwise legally severed the child/parent relationship is not required to present parent or guardian permission to be tested. An applicant who is at least 16 years of age may test if recommended by a public agency having supervision or custody under a court order. Recommendations must include the applicant's name and date of birth and must be signed by an official of the public agency having supervision or custody of the person under a court order. An applicant who is at least 16 years old may also test if required to take the examination under a justice or municipal court order~~

~~issued under the Code of Criminal Procedure, Article 45.054(a)(1)(C) (formerly codified as Family Code, §54.021(d)(1)(B)), or if enrolled in a Job Corps training program under the Workforce Investment Act of 1998 (29 United States Code, §§2801 et seq.) and its subsequent amendments.~~]

(A) The applicant must be 18 years old.

(B) An applicant who is 17 years of age is eligible with parental or guardian consent. An applicant who is 17 years of age must present written permission signed by the applicant's parent or guardian. An applicant who is 17 years of age and married, who has entered military service, who has been declared an adult by the court, or who has otherwise legally severed the child/parent relationship is not required to present parent or guardian permission to be tested.

(C) An applicant who is at least 16 years of age may test if recommended by a public agency having supervision or custody under a court order. Recommendations must include the applicant's name and date of birth and must be signed by an official of the public agency having supervision or custody of the person under a court order. An applicant who is at least 16 years old may also test if:

(i) required to take the examination under a justice or municipal court order issued under the Code of Criminal Procedure, Article 45.054(a)(1)(C) (formerly codified as Family Code, §54.021(d)(1)(B));

(ii) enrolled in a Job Corps training program under the Workforce Investment Act of 1998 (29 United States Code, §§2801 et seq.) and its subsequent amendments; or

(iii) enrolled in the adjutant general's department's Seaborne ChalleNGe Corps.

(3) Educational status. The applicant must not have received a high school diploma from an accredited high school in the United States. The applicant must not be enrolled in school, unless the applicant is enrolled in a High School Equivalency Program (HSEP) approved by the Texas Education Agency (TEA). A student who is 17 years of age is eligible to test if the student is enrolled in an HSEP approved by the TEA. The student must comply with the provisions of the HSEP.

(4) Minimum test scores. An applicant must achieve the appropriate minimum standard scores in effect at the time the applicant tested as established by the American Council on Education's General Educational Development Testing Service.

(b) Test centers shall verify that any person being tested meets the eligibility requirements in this section.

§89.47. Issuance of the Certificate.

(a) Test scores shall be accepted as official only when reported directly by official testing centers, the Defense Activity for Nontraditional Education Support, directors of Veterans Administration hospitals, and, in special cases, by the General Educational Development [~~(GED)~~] Testing Service (GEDTS).

(b) Following review for eligibility and approval, certificates will be issued directly to clients. A nonrefundable fee of $15 will be assessed for issuance of a certificate and a copy of test scores. A permanent file shall be maintained for all certificates issued.

(c) Duplicate certificates will be issued upon [~~written~~] request from the client. The client is required to pay a nonrefundable fee of $5.00 [~~$5~~] for each request for a duplicate certificate.

(d) The certificate of high school equivalency shall indicate the version of the test taken by the applicant: audiotape, large print, Braille, English, French, or Spanish.

(e) The state General Educational Development (GED) [~~GED~~] administrator may disapprove issuance of a certificate or may cancel a certificate under the following conditions:

(1) an applicant does not meet eligibility requirements under §89.43 of this title (relating to Eligibility for a Texas Certificate of High School Equivalency);

(2) the applicant in any way violates security of the restricted test material;

(3) the applicant presents fraudulent identification or is not who he or she purports to be;

(4) the applicant uses another person's certificate or test scores in an attempt to defraud; or

(5) the applicant willingly allows another person to use his or her certificate or test scores in an attempt to defraud.

(f) In the case of nonissuance or cancellation of a certificate, the applicant shall be notified in writing by the GED administrator that the certificate will not be issued or may be canceled.

(g) An applicant who has been notified that his or her certificate will not be issued or may be canceled may appeal to the state GED administrator within 30 days of receiving written notification.

(h) If, after further review, the state GED administrator does not approve issuance of the certificate or cancels a certificate, this decision may be appealed to the commissioner of education under Chapter 157 of this title (relating to Hearings and Appeals).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 17, 2006.

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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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CHAPTER 97. PLANNING AND ACCOUNTABILITY

SUBCHAPTER AA. ACCOUNTABILITY AND PERFORMANCE MONITORING

19 TAC §97.1004

(Editor's Note: In accordance with Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," Figure: 19 TAC §97.1004(b) is not included in the print version of the Texas Register. The Figure is available in the on-line edition of the July 28, 2006, issue of the Texas Register.)

The Texas Education Agency (TEA) proposes an amendment to §97.1004, concerning adequate yearly progress (AYP). The section establishes provisions related to AYP and sets forth the process for evaluating campus and district AYP status. The section also adopts the most recently published AYP Guide. The proposed amendment would adopt applicable excerpts of the *2006 Adequate Yearly Progress Guide*, dated July 2006.

Under the accountability provisions in the federal No Child Left Behind Act, all public school campuses, school districts, and the state are evaluated for AYP. Districts, campuses, and the state are required to meet AYP criteria on three measures: reading/English language arts, mathematics, and either graduation rate (for high schools and districts) or attendance rate (for elementary and middle/junior high schools). If a campus, district, or state that is receiving Title I, Part A funds fails to meet AYP for two consecutive years, that campus, district, or state is subject to certain requirements such as offering supplemental educational services, offering school choice, or taking corrective actions. To implement these requirements, the agency developed the AYP Guide. Agency legal counsel has determined that the commissioner of education should take formal rulemaking action to place into the *Texas Administrative Code* procedures related to AYP.

Through 19 TAC §97.1004, adopted effective July 14, 2005, the commissioner exercised rulemaking authority to establish provisions related to AYP and set forth the process for evaluating campus and district AYP status. Portions of each AYP Guide have been adopted beginning with the 2004 AYP Guide, and the intent is to annually update 19 TAC §97.1004 to incorporate provisions from the most recently published AYP Guide.

The proposed amendment to 19 TAC §97.1004 would update the rule to adopt applicable excerpts, *Sections II-V*, of the *2006 Adequate Yearly Progress Guide*, dated July 2006. These excerpted sections describe specific features of the system, AYP measures and standards, and appeals. In 2006, the U.S. Department of Education approved changes to specific components of the AYP system, including the areas addressed in the applicable excerpts of the 2006 AYP Guide. Examples of approved changes include an agreement requiring a decrease in the federal cap on alternative assessment proficient results and the establishment of specific procedures to address evaluation and reporting of information regarding students displaced by Hurricanes Katrina and Rita.

The proposed amendment to 19 TAC §97.1004 would also amend subsection (a) to correct reference to the measure for reading/English language arts. Subsection (d) would be modified to specify that the AYP Guide adopted for each previous school year prior to 2006-2007 will remain in effect with respect to that school year.

Criss Cloudt, associate commissioner for accountability and data quality, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the amendment.

Dr. Cloudt has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be to continue to inform the public of the AYP rating procedures for the public schools. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

The public comment period on the proposal begins July 28, 2006, and ends August 27, 2006. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

The amendment is proposed under the Texas Education Code (TEC), §7.055(b)(32), which authorizes the commissioner to perform duties in connection with the public school accountability system as prescribed by TEC, Chapter 39; TEC, §39.073, which authorizes the commissioner to determine how all indicators adopted under TEC, §39.051(b), may be used to determine accountability ratings; and TEC, §39.075(a)(4), which authorizes the commissioner to conduct special accreditation investigations in response to state and federal program requirements.

The amendment implements the Texas Education Code, §§7.055(b)(32), 39.073, and 39.075(a)(4).

§97.1004. Adequate Yearly Progress.

(a) In accordance with the federal No Child Left Behind Act and Texas Education Code, §§7.055(b)(32), 39.073, and 39.075, all public school campuses, school districts, and the state are evaluated for Adequate Yearly Progress (AYP). Districts, campuses, and the state are required to meet AYP criteria on three measures: reading/English language arts [~~reading/language arts~~] , mathematics, and either graduation rate (for high schools and districts) or attendance rate (for elementary and middle/junior high schools). The performance of a school district, campus, or the state is reported through indicators of AYP status established by the commissioner of education.

(b) The determination of AYP for school districts and charter schools in 2006 [~~2005~~] is based on specific criteria and calculations, which are described in excerpted sections of the 2006 [~~2005~~] AYP Guide provided in this subsection.
Figure: 19 TAC §97.1004(b)

(c) The specific criteria and calculations used in AYP are established annually by the commissioner of education and communicated to all school districts and charter schools.

(d) The specific criteria and calculations used in the AYP Guide adopted for the school year prior to 2006-2007 [~~2005-2006~~] remain in effect for all purposes, including accountability, data standards, and audits, with respect to that school year.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 17, 2006.

TRD-200603768
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: August 27, 2006
For further information, please call: (512) 475-1497

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19 TAC §97.1005

(Editor's Note: In accordance with Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," Figure: 19 TAC §97.1005(b) is not included in the print version of the Texas Register. The Figure is available in the on-line edition of the July 28, 2006, issue of the Texas Register.)

The Texas Education Agency (TEA) proposes an amendment to §97.1005, concerning accountability and performance

monitoring. The section describes the purpose of the Performance-Based Monitoring Analysis System (PBMAS) and manner in which school districts and charter school performance is reported. The section also adopts the most recently published PBMAS Manual. The proposed amendment would adopt applicable excerpted sections of the PBMAS 2006 Manual, dated June 8, 2006.

House Bill 3459, 78th Texas Legislature, 2003, added the Texas Education Code (TEC), §7.027, limiting and redirecting monitoring done by the TEA to that required to ensure school district and charter school compliance with federal law and regulations; financial accountability, including compliance with grant requirements; and data integrity for purposes of the Public Education Information Management System (PEIMS) and accountability under TEC, Chapter 39. Legislation passed in 2005 renumbered TEC, §7.027, to TEC, §7.028. To meet this monitoring requirement, the TEA developed the PBMAS, which is used in conjunction with other evaluation systems, to monitor performance and program effectiveness of special programs in school districts and charter schools.

Agency legal counsel has determined that the commissioner of education should take formal rulemaking action to place into the *Texas Administrative Code* procedures related to the PBMAS. Given the statewide application of the PBMAS and the existence of sufficient statutory authority for the commissioner of education to formally adopt rules in this area, portions of each annual PBMAS Manual have been adopted since the first PBMAS Manual was developed in 2004-2005. The PBMAS evolves from year to year, and the intent is to annually update 19 TAC §97.1005 to refer to the most recently published PBMAS Manual.

The proposed amendment to 19 TAC §97.1005 would update the current rule by adopting excerpted sections of the PBMAS 2006 Manual, dated June 8, 2006. These excerpted sections describe the specific criteria and calculations that will be used to assign 2006 PBMAS performance levels. In 2006, two new PBMAS indicators are previewed: one in the bilingual education/English as a Second Language program area that measures English language proficiency rates and one in the special education program area that measures student participation in one of the new statewide assessments. A new Annual Measurable Achievement Objective is implemented in the No Child Left Behind program area. Changes to the PBMAS indicators for 2006 are marked *"New!"* for easy reference.

The proposed amendment would also amend language in subsection (a) to update the TEC reference to reflect action taken by the legislature in 2005 to renumber the statute. In addition, subsection (d) would be modified to specify that the PBMAS manual adopted for each previous school year prior to 2006-2007 will remain in effect with respect to that school year.

Criss Cloudt, associate commissioner for accountability and data quality, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the amendment.

Dr. Cloudt has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be to continue informing the public of the existence of annual manuals specifying PBMAS procedures by including this rule in the *Texas Administrative Code*. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

The public comment period on the proposal begins July 28, 2006, and ends August 27, 2006. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

The amendment is proposed under the Texas Education Code, §7.028, which authorizes the agency to monitor as necessary to ensure school district and charter school compliance with state and federal law and regulations.

The amendment implements the Texas Education Code, §7.028.

§97.1005. Performance-Based Monitoring Analysis System.

(a) In accordance with Texas Education Code, §7.028(a) [~~§7.027(a)~~] , the purpose of the Performance-Based Monitoring Analysis System (PBMAS) is to report annually on the performance of school districts and charter schools in selected program areas: bilingual education/English as a Second Language, career and technology education, special education, and certain Title programs under the federal No Child Left Behind Act. The performance of a school district or charter school is reported through indicators of student performance and program effectiveness and corresponding performance levels established by the commissioner of education.

(b) The assignment of performance levels for school districts and charter schools in the 2006 [~~2005~~] PBMAS is based on specific criteria and calculations, which are described in excerpted sections of the PBMAS 2006 [~~2005~~] Manual provided in this subsection.
Figure: 19 TAC §97.1005(b)

(c) The specific criteria and calculations used in the PBMAS are established annually by the commissioner of education and communicated to all school districts and charter schools.

(d) The specific criteria and calculations used in the annual PBMAS manual adopted for the school years [~~year~~] prior to 2006-2007 [~~2005-2006~~] remain in effect for all purposes, including accountability and performance monitoring, data standards, and audits, with respect to that school year.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 97. COMMUNICABLE DISEASES
SUBCHAPTER B. IMMUNIZATION REQUIREMENTS IN TEXAS ELEMENTARY AND SECONDARY SCHOOLS AND INSTITUTIONS OF HIGHER EDUCATION

25 TAC §97.63

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes an amendment to §97.63, concerning the statewide immunization requirements in Texas elementary and secondary schools and institutions of higher education.

BACKGROUND AND PURPOSE

In accordance with the requirements of House Bill 1316 of the 79th Regular Session of the Texas Legislature (2005), which amended the Human Resources Code, §42.043, the amendment to 25 TAC, §97.63, provides that children enrolled in child-care facilities, pre-kindergarten, or early childhood programs are required to receive two additional age-appropriate disease vaccinations, hepatitis A and invasive pneumococcal. In addition, the five-dose diphtheria-tetanus-pertussis containing vaccine requirement is clarified by providing that upon entry into kindergarten, students are required to have five doses of a diphtheria-tetanus-pertussis containing vaccine one of which must have been received on or after the fourth birthday; or, if the fourth dose was administered on or after the fourth birthday, only four doses are required.

SECTION-BY-SECTION SUMMARY

Section 97.63(2)(A)(i) would provide that hepatitis A and invasive pneumococcal disease be included in the list of age-appropriate vaccinations provided to children enrolled in child-care facilities, pre-kindergarten, or early childhood programs, as required by HB 1316.

Section 97.63(2)(A)(ii), which provides that hepatitis A be provided to children in only high incidence geographic areas as mandated, would be deleted. Deletion is necessary to give full effect to HB 1316. Section 97.63(2)(B)(ii)(I) proposes new language that provides that upon entry into kindergarten, students are required to have five doses of a diphtheria-tetanus-pertussis containing vaccine one of which must have been received on or after the fourth birthday; or, if the fourth dose was administered on or after the fourth birthday, only four doses are required. This is a clarification of the existing requirement.

Section 97.63(2)(B)(ii)(II) would include that students seven years of age or older are required to have at least three doses of tetanus-diphtheria containing vaccine; the amendment would propose that the phrase, "who started their vaccinations after age" be deleted from the section. This is part of the clarification referenced above at §97.63(2)(B)(ii)(I). Additionally, the amendment to §97.63 provides corrections to the rule based upon the current department organizational structure.

FISCAL IMPACT

Casey S. Blass, Section Director, Disease Prevention and Intervention Section, has determined that for each year of the first five years that the section will be in effect, the additional costs associated with enforcing and administering the section as proposed are primarily vaccine costs. The funds to purchase these vaccines were funded through a portion of an exceptional item by the 79th Regular Session of the Texas Legislature. Reimbursement of vaccine administration fees is available through Medicaid and CHIP for children who receive benefits through those programs. For other children, an out-of-pocket administration fee may be charged to cover administration costs. Children may not be denied vaccines for a family's inability to afford the administration fee and local health departments may incur a cost for those children.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Blass has also determined that there will be no effect on small businesses or micro-businesses required to comply with the section as proposed. This was determined by interpretation of the rule that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the section. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Mr. Blass has also determined that for each year of the first five years the section is in effect, the public will benefit from adoption of the section. The public benefit anticipated as a result of enforcing or administering the section as proposed is to provide age-appropriate vaccinations for hepatitis A and invasive pneumococcal disease to children enrolled in child-care facilities, pre-kindergarten, or early childhood programs. The public will also benefit from the proposed clarifications, since these changes would make the rule requirements easier to understand.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed amendment does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Tim Hawkins, Disease Prevention and Intervention Section, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7111 extension 3394, or (800) 252-9152. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Council, Cathy Campbell, certifies that the proposed rule has been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The amendment is proposed under House Bill 1316 of the 79th Regular Session of the Texas Legislature (2005), and Health and Safety Code, §81.023, which requires the department to develop immunization requirements for children; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The amendment affects Health and Safety Code, §81.023; Texas Education Code, §38.001 and §51.933; and Human Resources Code, §42.043.

§97.63. Immunization Requirements in Texas Elementary and Secondary Schools and Institutions of Higher Education [~~Required Immunizations~~].

Every child in the state shall be immunized against vaccine preventable diseases caused by infectious agents in accordance with the following immunization schedule.

(1) In accordance with the Department of State Health Services [~~Texas Department of Health~~] Immunization Schedule as informed by the Advisory Committee on Immunization Practices' (ACIP) recommendations and adopted by the Executive Commissioner of the Health and Human Services Commission [~~Texas Board of Health~~] and published in the *Texas Register* annually, for all vaccines herein, vaccine doses administered less than or equal to four days before the minimum interval or age shall be counted as valid.

(2) A child or student shall show acceptable evidence of vaccination prior to entry, attendance, or transfer to a child-care facility or public or private elementary or secondary school, or institution of higher education.

(A) Children enrolled in child-care facilities, pre-kindergarten, or early childhood programs shall have the following immunizations: [~~.~~]

[~~(i)~~] Age-appropriate vaccination against diphtheria, pertussis, tetanus, poliomyelitis, *Haemophilus influenzae* type b, measles, mumps, rubella, hepatitis B, hepatitis A, invasive pneumococcal disease, and varicella in accordance with the [~~Texas~~] Department of State Health Services Immunization Schedule as informed by the Advisory Committee on Immunization Practices' (ACIP) recommendations and adopted by the Executive Commissioner of the Health and Human Services Commission [~~Texas Board of Health~~] and published in the *Texas Register* annually. A copy of the current schedule is available at www.ImmunizeTexas.com or by mail to the Department of State Health Services [~~Texas Department of Health~~], 1100 West 49th Street, Austin, Texas 78756.

[~~(ii)~~ ~~Hepatitis A. Age-appropriate vaccination against hepatitis A for children attending a child-care facility, pre-kindergarten or early childhood programs located in a high incidence geographic area as designated by the department. A list of geographic areas for which hepatitis A is mandated shall be published in the *Texas Register* on an annual basis and is available at www.ImmunizeTexas.com or by mail to the Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756.~~]

(B) Students in kindergarten through twelfth grade shall have the following vaccines.

(i) Poliomyelitis.

(I) Upon entry into kindergarten, students are required to have four doses of polio vaccine one of which must have been received on or after the fourth birthday. Or, if the third dose was administered on or after the fourth birthday only three doses are required. If any combination of four doses of OPV and IPV was received before four years of age no additional dose if required.

(II) Polio vaccine is not required for persons eighteen years of age or older.

(ii) Diphtheria/Tetanus/Pertussis.

(I) Upon entry into kindergarten, students are required to have five doses of a diphtheria-tetanus-pertussis containing vaccine one of which must have been received on or after the fourth birthday. Or, if the fourth dose was administered on or after the fourth birthday, only four doses are required. [~~in any combination unless the fourth dose was received on or after the fourth birthday in which case only four doses are required.~~]

(II) Students [~~who started their vaccinations after age~~] seven years of age or older are required to have at least three doses of a tetanus-diphtheria containing vaccine. Any combination of three doses of a tetanus-diphtheria containing vaccine will meet this requirement. One dose of a tetanus-diphtheria containing vaccine is required within the last ten years.

(iii) Measles. Two doses of measles-containing vaccine are required. The first dose shall be administered on or after the first birthday.

(iv) Rubella. One dose of rubella vaccine received on or after the first birthday is required.

(v) Mumps. One dose of mumps vaccine received on or after the first birthday is required.

(vi) Hepatitis B.

(I) Three doses of hepatitis B vaccine are required for the following grades for the following school years:

(-a-) 2004 - 2005 for kindergarten through fifth grade and seventh through tenth grade;

(-b-) 2005 - 2006 for kindergarten through eleventh grade; and

(-c-) thereafter, beginning in school year 2006 - 2007, for all students in grades kindergarten through twelfth grade.

(II) In some circumstances, the United States Food and Drug Administration may approve the use of an alternative dosage schedule for an existing vaccine. These alternative regimens may be used to meet this requirement only when alternative regimens are fully documented. Such documentation must include vaccine manufacturer and dosage received for each dose of that vaccine.

(vii) Varicella. One dose of varicella vaccine received on or after the first birthday is required for the following grades for the following school years:

(I) 2004 - 2005 for kindergarten through fourth grade and seventh through tenth grade;

(II) 2005 - 2006 for kindergarten through fifth grade and seventh through eleventh grade; and

(III) thereafter, beginning in school year 2006 - 2007, for all students in grades kindergarten through twelfth grade. Two doses are required if the child was thirteen years old or older at the time the first dose of varicella vaccine was received.

(viii) Hepatitis A. Upon entry into kindergarten through third grade, two doses of hepatitis A vaccine are required for students attending a school located in a high incidence geographic area as designated by the department. The first dose shall be administered on or after the second birthday. A list of geographic areas for which hepatitis A is mandated shall be published in the *Texas Register* on an annual basis and is available at www.ImmunizeTexas.com, or by mail request at Department of State Health Services [~~Texas Department of Health~~], 1100 West 49th Street, Austin, Texas 78756.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 14, 2006.

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Cathy Campbell
General Counsel
Department of State Health Services
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For further information, please call: (512) 458-7111 x6972

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER F. MOTOR VEHICLE SALES TAX

34 TAC §3.79

The Comptroller of Public Accounts proposes new §3.79, concerning standard presumptive value. This new section implements House Bill 4, 79th Legislature, 3rd Called Session, 2006, which adds Tax Code §152.0412 and changes the tax base for calculating sales and use tax due on the sale of a used motor vehicle in a private-party transaction. As of October 1, 2006, the sales price of a used motor vehicle, for purposes of determining the tax due, is no less than 80% of the used motor vehicle's standard presumptive value, or an appraised value as established by a certified appraisal. If a used motor vehicle is purchased from a dealer, the sales price on the title application or dealer's invoice shall be used to calculate the tax due.

Subsection (a) defines relevant terms. Subsection (b) defines how tax due is calculated. Subsection (c) defines the sales price of a used motor vehicle to calculate the tax due. Subsection (d) defines requirements for certified appraisals. Subsection (e) identifies used motor vehicles that are excluded from this section. Subsection (f) addresses payments under protest and refunds.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the new rule will be in providing additional information regarding their motor vehicle sales tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the new section may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This new section is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new section implements Tax Code, §152.0412.

§3.79. Standard Presumptive Value.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Appraised value. The retail value of a used motor vehicle for the purpose of calculating motor vehicle sales tax due on the date of a certified appraisal.

(2) County working day. A day in which a county tax office is open for business to the public.

(3) Date of purchase. Same as date of sale; the day the motor vehicle is delivered to the purchaser unless otherwise specified by written agreement.

(4) Dealer. A person who holds a license issued pursuant to Transportation Code, Chapter 503, Subchapter B, or under similar regulatory requirements of another state. The term includes:

(A) a dealer authorized by law and by franchise agreement to offer for sale a new motor vehicle;

(B) an independent dealer authorized by law to offer for sale a motor vehicle other than a new motor vehicle;

(C) a wholesale motor vehicle dealer;

(D) a wholesale auction dealer;

(E) a motorcycle dealer;

(F) a house trailer dealer;

(G) a trailer or semitrailer dealer;

(H) any other dealer as provided by Transportation Code, Chapter 503, Subchapter B, but not a drive-a-way operator.

(5) Insurance adjuster. A person licensed under Insurance Code, Chapter 4101, or licensed or operating under similar regulatory requirements of another state.

(6) Motor vehicle. A self-propelled vehicle designed to transport persons or property upon the public highways and a vehicle designed to be towed by a self-propelled vehicle while carrying property. The term includes trucks, automobiles, trailers, trailers sold unassembled in a kit, semitrailers, house trailers, dollies, jeeps, stingers, auxiliary axles, converter gears, truck cab/chassis, and motorcycles. A unit that meets the definition of a "motor vehicle" does not lose its identity as a motor vehicle if tangible personal property is added to the vehicle allowing the unit to perform a specialized function but prohibiting the vehicle from transporting separate property or

persons other than the driver. An example of such a vehicle would be a flatbed truck upon which oil well servicing equipment is attached.

(7) Private-party transaction. A retail sale of a motor vehicle in which no party is a dealer.

(8) Retail sale. A sale of a motor vehicle other than:

(A) a sale of a new motor vehicle in which the purchaser is a franchised dealer who is authorized by law and by franchise agreement to offer the vehicle for sale as a new motor vehicle and who acquires the vehicle to sell in a manner provided by law or for purposes allowed under Transportation Code, Chapter 503;

(B) a sale of a vehicle other than a new motor vehicle in which the purchaser is a dealer who holds a dealer's license issued under Transportation Code, Chapter 503, and who acquires the vehicle either for the exclusive purpose of resale in the manner provided by law or for purposes allowed under Transportation Code, Chapter 503; or

(C) a sale to a franchised dealer of a new motor vehicle removed from the franchised dealer's inventory for the purpose of entering into a contract to lease the vehicle to another person if, immediately after executing the lease contract, the franchised dealer transfers title of the vehicle and assigns the lease contract to the lessor of the vehicle.

(9) Standard presumptive value. The private-party transaction value of a motor vehicle, as determined by the Texas Department of Transportation based on an appropriate regional guidebook of a nationally recognized motor vehicle value guide service, or based on another motor vehicle guide publication that the department determines is appropriate if a private-party transaction value for the motor vehicle is not available from a regional guidebook.

(10) Used motor vehicle. A motor vehicle that previously has been the subject of a retail sale.

(b) Calculating tax due on a used motor vehicle. Tax is due on the sales price as defined in subsection (c) of this section, less any deductions as provided by Tax Code, §152.002(b).

(c) Sales price of a used motor vehicle.

(1) Subject to the exceptions in subsections (c)(2), (c)(3), and (e) of this section, the sales price of a used motor vehicle is the greater of:

(A) the amount paid or to be paid for the motor vehicle, or

(B) 80% of the motor vehicle's standard presumptive value.

(2) If the amount paid or to be paid is less than 80% of the motor vehicle's standard presumptive value, the purchaser may establish the sales price of the motor vehicle for the purpose of calculating motor vehicle sales tax due by obtaining a certified appraisal, as provided for in subsection (d) of this section.

(3) The sales price of a used motor vehicle may be established by:

(A) a properly completed Application for Texas Certificate of Title, Form 130-U, signed by both purchaser and seller when the seller is a Texas dealer; or

(B) documentation, including a receipt or invoice, provided by the seller to the purchaser of the vehicle when the seller is licensed by or under similar regulatory requirements of another state.

(d) Certified appraisal to establish the sales price of a used motor vehicle.

(1) Time limit. A purchaser must obtain and present to the county tax assessor-collector a certified appraisal within 20 county working days after the date of purchase or, if purchased out of state, within 20 county working days after bringing the motor vehicle into Texas.

(2) Appraisal form. A certified appraisal must be on a form prescribed by the comptroller.

(3) Appraisal standards. Upon request by a purchaser of a used motor vehicle, a dealer must provide a certified appraisal. However, a dealer may only provide appraisals for the categories of motor vehicles which the dealer is licensed to sell under Transportation Code, Chapter 503, Subchapter B. An insurance adjuster may appraise any type of used motor vehicle. The dealer or insurance adjuster must view the motor vehicle in person and provide all the information requested on the appraisal form prescribed by the comptroller for the appraisal to be valid, including the appraised value of the used motor vehicle.

(4) Appraisal fee.

(A) Except as provided by clause (i) and (ii) of this subparagraph, a dealer may charge no less than $100 and no more than $300 for a certified appraisal:

(i) a licensed motorcycle dealer may charge no less than $40 and no more than $300 for a certified appraisal of a motorcycle; and

(ii) a dealer may charge no less than $100 and no more than $500 for a certified appraisal of a house trailer, travel trailer, or motor home.

(B) An insurance adjuster is not limited to the amount charged for a certified appraisal under this section

(C) The fee for a certified appraisal is not subject to limited sales and use tax under Tax Code, Chapter 151, and is not subject to motor vehicle sales and use tax under Tax Code, Chapter 152.

(5) Retention of certified appraisals. A county tax assessor-collector shall retain a certified appraisal for four years from the end of the current fiscal year in which it is presented and accepted.

(6) Questioning a certified appraisal. A county tax assessor-collector may question a certified appraisal in the manner as provided in Tax Code, §152.062(e).

(e) Excluded vehicles. This section does not apply to:

(1) vehicles involved in an even exchange or trade, as provided by Tax Code, §152.024;

(2) vehicles received as a gift, as provided by Tax Code, §152.025;

(3) vehicles acquired through a mechanic's lien, as provided in Property Code, Chapter 70;

(4) vehicles acquired through a storage lien, as provided by Occupations Code, Chapter 2303;

(5) abandoned or abandoned nuisance vehicles acquired under Transportation Code, Chapter 683; and

(6) vehicles eligible for a specialty license plate as a classic motor vehicle, as provided in Transportation Code, §504.501.

(f) Payments under protest and refunds.

(1) Persons seeking the recovery of payments under protest and refunds relating to this section must follow the provisions set forth in §3.75 of this title (relating to Refunds, Payments Under Protest, Payment Instruments and Dishonored Payments).

(2) If the purchaser of a used motor vehicle paid less than 80% of standard presumptive value and paid tax on a sales price as determined by subsection (c)(1)(B) of this section, the purchaser may request a refund from the comptroller if the purchaser obtains a valid certified appraisal within 20 county working days of the motor vehicle's purchase or use in Texas.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 14, 2006.

TRD-200603745
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: August 27, 2006
For further information, please call: (512) 475-0387

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PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 25. MEMBERSHIP CREDIT

SUBCHAPTER A. SERVICE ELIGIBLE FOR MEMBERSHIP

34 TAC §25.1

The Board of Trustees (Board) of the Teacher Retirement System of Texas (TRS or the system) proposes amendments to §25.1 concerning requirements for employment qualifying for membership in TRS. The proposed amendments would ensure fair and consistent application of membership eligibility requirements.

Section 25.1 establishes the requirements for employment qualifying for membership in TRS. Employment for one-half or more of the standard workload is one of the eligibility requirements. Supplemental information provided to TRS covered employers has for years included hourly minimums for positions that have no equivalent full-time position. A crossing guard is an example of a typical part-time position for which there is usually no equivalent full-time employment. The proposed amendments incorporate this long-standing interpretation to ensure fair and consistent application of the membership eligibility requirements. The proposal provides that if there is no equivalent full-time employment for a non-certified position, the minimum number of hours per week that will qualify the position for TRS membership is 15 hours. If there is no equivalent full-time employment for a certified position, the minimum number of hours per week that will qualify the position for TRS membership is 20 hours. These additions incorporate longstanding interpretations of the rule and ensure fair and consistent application of membership eligibility requirements.

Further, the current rule does not expressly state how positions with varied work schedules should be evaluated for membership eligibility. The proposed language requires the number of hours worked in a calendar month to be averaged to determine if the position is eligible for membership, clarifying how positions with varied work schedules are treated for membership eligibility purposes and ensuring that all persons eligible for membership are reported to TRS. Under the proposal, if the average number of hours worked equals or exceeds one-half of the hours required for a similar full-time position, then the position is eligible for membership in TRS. For instance, if, during half the month, a counselor is required to work 8 1/2 hours per day for three days every other week but only for two days a week during the remaining weeks of the month, the counselor is not working a 20-hour week every week. Under the proposed amended rule, however, the counselor would be working an average of 21.25 hours per week and, therefore, the counseling position would be eligible for TRS membership and the employer must report it as such.

Tony C. Galaviz, TRS Chief Financial Officer, has determined that, for each year of the first five years the proposed amended rule would be in effect, enforcing or administering the rule will have no foreseeable implications relating to cost or revenues of state or local governments.

For each year of the first five years that the proposed amended rule would be in effect, Mr. Galaviz has determined that the public benefit would be to clarify TRS membership eligibility requirements related to full-time service in positions that have no equivalent full-time employment or that have varied work schedules. For each year of the first five years the section will be in effect, it is possible that there would be an economic cost to persons required to comply with rule, including TRS-qualified employers reporting employment for purposes of TRS membership eligibility and employees in positions affected by the proposal. The proposed amendments to the rule regarding the minimum number of hours of employment that will qualify the employment for membership are not anticipated to result in an economic cost to employers or employees. These amendments simply adopt the administrative interpretations used for years in administering the membership eligibility requirements. However, to the extent the proposal authorizes employers to average the number of hours worked in a month and thereby results in employees working a varied work schedule to now be eligible for membership, there may be an economic cost to the employer and the employee. The economic cost to the employer for active employees includes employer contributions equal to the state contribution rate for the first 90 days of employment as well as any employer contributions for amounts paid over the state minimum salary for the position. For active employees, the economic cost is the membership contribution in the amount of 6.4% of eligible compensation. However, the economic benefit of membership, including the future retirement benefits associated with the membership eligible employment, outweigh the economic cost to the employee of the contributions owed. There may also be an economic cost associated with the amendments authorizing the averaging of hours to the employer for retired employees. If averaging the number of hours worked results in the employment now being eligible for membership, the employer will owe the pension surcharge in the amount of 12.4% of the compensation paid to the retiree unless the retiree was reported as working for that employer in January, 2005. Similarly, if the retiree is also enrolled in TRS-Care, the health benefit surcharge will also be owed unless the retiree was reported as working for that employer in January, 2005. To the extent that any portion of the pension surcharge and the health benefit surcharge are passed on to the employee by the employer by agreement between the

parties, the amendments authorizing averaging may result in an economic cost to retired employees.

Mr. Galaviz has also determined that, for each year of the first five years the proposed section is in effect, there will be no effect on a local economy, and therefore no local employment impact statement is required under §2001.022, Government Code. Moreover, there will be no adverse economic effect on small businesses or micro-businesses under §2006.002, Government Code as a result of enforcing the proposed section.

Comments may be submitted in writing to Ronnie Jung, Executive Director, 1000 Red River, Austin, Texas 78701. To be fully considered, written comments must be received by TRS within 30 days of the publication of this notice of proposed rulemaking.

Statutory Authority: §825.102, Government Code, which authorizes the TRS Board to adopt rules for eligibility for membership. Cross-reference to Statute: §821.001, Government Code, concerning definitions, including those for "employee" and "membership service," and §822.001, Government Code, concerning TRS membership requirement.

§25.1. Full-time Service.

Employment of a person [~~Persons employed~~] by a TRS covered employer for one-half or more of the standard full-time work load at a rate comparable to the rate of compensation for other persons employed in similar positions is defined as regular, full-time service eligible for membership. Any employee of a public state-supported educational institution in Texas shall be considered to meet the requirements of the preceding sentence if his or her customary employment is for 20 hours or more for each week and for four and one-half months or more in one school year. Membership eligibility for positions requiring a varied work schedule is based on the average of the number of hours worked in a calendar month and the average number of hours worked must equal or exceed one-half of the hours required for a similar full-time position. If there is no full-time equivalent of a given non-certified position, the minimum number of hours required per week that will qualify the position for TRS membership is 15. If there is no full-time equivalent of a given certified position, the minimum number of hours required per week that will qualify the position for TRS membership is 20.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 14, 2006.

TRD-200603753
Ronnie G. Jung
Executive Director
Teacher Retirement System of Texas
Earliest possible date of adoption: August 27, 2006
For further information, please call: (512) 542-6438

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SUBCHAPTER B. COMPENSATION

34 TAC §25.21

The Board of Trustees (Board) of the Teacher Retirement System of Texas (TRS or the system) proposes amendments to §25.21, concerning compensation subject to deposit and credit. The amended section provides guidance to public school employers regarding the appropriate reporting of compensation and the appropriate application of contribution rates to compensation. The amendments are proposed in accordance with §2001.006 of the Government Code, which allows TRS to adopt rules and take other administrative action in preparation for the implementation of legislation that has become law but has not taken effect in application. The proposed amendments have also been adopted on an emergency basis and are published in the July 7, 2006, of the *Texas Register* (31 TexReg 5431).

The proposed amendments to the rule allow TRS to implement, in a manner consistent with plan qualification requirements, House Bill 1, 79th Legislature, Third Called Session (2006) (House Bill 1), which amends §822.201, Government Code. House Bill 1 became law immediately, to be applied beginning with the 2006 - 2007 school year. The proposed amendments will enable TRS to continue to operate as a qualified retirement plan and to provide communications that are necessary and appropriate to ensure proper compensation reporting as TRS members report for work in the 2006 - 2007 school year, with some employees reporting to work as early as July 2006. Further, the amended rule as proposed will provide employers and members affected by House Bill 1 necessary, appropriate, and timely guidance to use in making informed budget, programming, and other decisions for the 2006 - 2007 school year, which is imminent.

House Bill 1 amends Chapter 22, Subchapter D, Education Code to create a new "health care supplementation" election. House Bill 1 allows eligible active employees to elect in writing, each school year, whether to designate a portion of the employee's compensation to be used as health care supplementation. House Bill 1 amends the TRS plan provision of §822.201(c)(10), Government Code to provide that any compensation designated as health care supplementation is excluded from salary and wages for TRS purposes, subject to an annual limit of $1,000. It is the policy of the State of Texas, as expressed in §825.506, Government Code that the provisions of the TRS retirement benefit plan be construed and administered in a manner that the retirement system's benefit plan will be considered a qualified plan under Section 401(a) of the Internal Revenue Code of 1986 (26 U.S.C. §401). Section 825.506, Government Code authorizes the Board to adopt rules that modify the retirement plan to the extent necessary for the retirement system to be a qualified plan and provides that the rules adopted by the Board are to be considered part of the plan.

In enacting House Bill 1, the legislature expressed its intent that TRS take whatever action necessary under §825.506 so that the TRS retirement benefit plan remains a qualified plan under the Internal Revenue Service Code. H.J. OF TEX., 79th Leg., 3d C.S. 331 (2006) (statement of legislative intent by Representative Chisum and Representative Eiland).

The proposed amendments to §25.21 are reasonable modifications to the extent necessary for the plan to be a qualified plan. The amendments also protect the employer pickup of TRS member contributions as established under §825.409, Government Code, which provides, in conformity with the Internal Revenue Code, that employees do not have the option of choosing to receive the contributed amounts directly instead of having them paid by the employer to the retirement system.

In addition, the rule amendments conform §25.21 to the language House Bill 1 uses in amending §822.201(c)(11), Government Code to distinguish the superseded compensation supplementation program from the new health care supplementation program created under House Bill 1.

Tony C. Galaviz, TRS Chief Financial Officer, has determined that, for each year of the first five years the proposed amendments will be in effect to implement House Bill 1, enforcing or administering the amended rule will have foreseeable implications relating to cost or revenues of state or local governments. Implementation of the proposed amendments will increase contributions to the TRS pension fund while saving local public education employers the cost of converting or modifying their payroll systems to account for compensation designated as health care supplementation that would not be TRS-creditable if taken as a cash payment by the employee. Under the proposed amended rule, compensation designated as health care supplementation by employee election under House Bill 1 would be TRS-creditable and subject to state and member contributions to the TRS plan fund. The estimated amount of increased contributions to TRS is as much as $64 annually from an employee eligible to designate up to $1,000 and as much as $60 annually for the state contribution for such an employee. Because local public education employers are required to pay the TRS plan an amount equal to the state contribution for the first 90 days of employment of a new employee, there will be an increased contribution from employers as well. For example, for a new employee who would designate the full $1,000, the local employer would be responsible for approximately $15 in contributions to the TRS plan during that employee's first 90 days of employment. However, because an employee could elect to designate no amount at all or an amount less than $1,000, the total amount of increased contributions to TRS cannot be reasonably estimated. The estimated amount of savings for local public education employers depends on the size and resources of local employers and so cannot be reasonably estimated.

For each year of the first five years that the amended rule will be in effect, Mr. Galaviz has determined that the public benefit will be to maintain the qualified status of the retirement benefit plan under the federal Internal Revenue Code and to provide employers and members affected by House Bill 1 necessary, appropriate, and timely guidance to use in making informed budget, programming, and other decisions for the 2006 - 2007 school year. For each year of the first five years the amended section will be in effect, there may be a short-term economic cost to TRS members in the amount of their member contribution to TRS, less federal income tax on such cash payment. The estimated amount of this short-term cost to an individual employee is estimated to be no greater than 6.4% of the amount designated, or a maximum of $64 per year, before federal income taxes. The net economic cost to an individual employee cannot be reasonably calculated because it depends on highly variable factors such as income tax bracket and personal choice about elections that might be made if the proposed amendments were not implemented. It is unlikely that all eligible employees would have designated a portion of their salary as health care supplementation because, in the absence of the proposed amendments, doing so would make the salary amount ineligible to be included in the calculation of TRS benefits, thus reducing the employee's salary average used to calculate the amount of a service retirement standard annuity benefit. Employees nearing retirement are estimated to incur no additional economic cost as a result of this rule since they would be unlikely to reduce their TRS-creditable salary by designating a portion of the salary as health care supplementation. Any economic cost to TRS members are offset by the long-term benefits accruing from implementation of the proposed amendments. Without implementation of the proposed amended rule, TRS plan qualification and the employer pick-up of member contributions would be at risk, creating risk that the 6.4% of all salary (not just the salary amount designated as health care supplementation), which represents member contributions to the plan, would be fully and immediately taxed as income when earned. Under the TRS plan, member contributions currently are treated as "picked up" by the employer, permitting employees to defer any federal income taxation on those contributions until they are distributed to the employee by the plan in the form of a refund of accumulated contributions or retirement benefits. The estimated economic benefit to an individual employee cannot be reasonably calculated because it depends on highly variable factors such as individual federal income tax brackets and individual amounts of member contributions made to the plan each year. In any event, any costs to persons required to comply with rule result from implementation of House Bill 1 and the requirements of §825.506, Government Code that the provisions of the TRS retirement benefit plan be construed and administered in a manner that the retirement system's benefit plan will be considered a qualified plan under Section 401(a) of the Internal Revenue Code of 1986 (26 U.S.C. §401).

Mr. Galaviz has also determined that, for each year of the first five years the proposed amendments are in effect, there will be no effect on a local economy, and therefore no local employment impact statement is required under §2001.022, Government Code. Moreover, there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing the amended section.

Comments may be submitted in writing to Ronnie Jung, Executive Director, 1000 Red River, Austin, Texas 78701. To be fully considered, written comments must be received by TRS within 30 days of the publication of this notice of proposed rulemaking.

Statutory Authority: The amended section is proposed under the following: §825.102, Government Code, which authorizes the Board to adopt rules for the administration of the funds of the retirement system; §825.506(a), Government Code, which authorizes the Board to adopt rules that modify the TRS's retirement benefit plan to the extent necessary for the retirement system to be a qualified plan and states that the rules adopted by the Board are to be considered part of the plan.

Cross-reference to Statute: House Bill 1, 79th Legislature, Third Called Session (2006), which amends Chapter 22, Subchapter D, Education Code, relating to compensation supplementation for school district employees, and §822.201, Government Code, relating to TRS member compensation; and §825.506(a), Government Code, which requires that the provisions of the TRS retirement plan be construed and administered in a manner that the retirement system's benefit plan will be considered a qualified plan under §401(a) of the Internal Revenue Code of 1986 (26 U.S.C. §401).

§25.21. Compensation Subject to Deposit and Credit.

(a) - (b) (No change.)

(c) The following types of monetary compensation are to be included in annual compensation:

(1) - (6) (No change.)

(7) a merit salary increase made under Education Code, §51.962; [~~and~~]

(8) amounts deducted from regular pay for a qualified transportation benefit under Government Code §659.202; and[~~.~~]

(9) compensation designated as health care supplementation by an employee under Subchapter D, Chapter 22, Education Code,

as amended by House Bill 1, 79th Legislature, Third Called Session. This paragraph modifies the provision of the retirement plan described in §822.201, Government Code, as amended by House Bill 1, 79th Legislature, Third Called Session, to the extent necessary for the retirement system to be a qualified plan.

(d) The following are excluded from annual compensation:

(1) - (9) (No change.)

(10) active employee health coverage or compensation supplementation or any other amount received by an employee under former Article 3.50-8, Insurance Code; former Chapter 1580, Insurance Code; Subchapter D, Chapter 22, Education Code, as that subchapter existed on January 1, 2006; or Rider 9, page III-39, Chapter 1330, Acts of the 78th Legislature, Regular Session, 2003 (the General Appropriations Act), regardless of whether the employee receives the amount in cash, uses it for payment of health care coverage, or uses it for any other option available by law;

(11) - (12) (No change.)

(e) - (f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 13, 2006.

TRD-200603731
Ronnie G. Jung
Executive Director
Teacher Retirement System of Texas
Earliest possible date of adoption: August 27, 2006
For further information, please call: (512) 542-6438

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 4. COMMERCIAL VEHICLE REGULATIONS AND ENFORCEMENT PROCEDURES

SUBCHAPTER A. REGULATIONS GOVERNING HAZARDOUS MATERIALS

37 TAC §4.1

The Texas Department of Public Safety proposes amendments to Chapter 4, Subchapter A, §4.1, concerning Regulations Governing Hazardous Materials.

Amendment to §4.1 is necessary in order to ensure that the Federal Hazardous Material Regulations, incorporated by reference in the section, reflect all amendments and interpretations issued through July 1, 2006.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Ybarra also has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to ensure to the public greater compliance by motor carriers with all of the statutes and regulations pertaining to the safe operation of commercial vehicles in this state. There is no adverse economic impact anticipated for individuals, small businesses, or micro-businesses.

The Texas Department of Public Safety, in accordance with the Administrative Procedures and Texas Register Act, Texas Government Code, §§2001 *et seq*., and Texas Transportation Code, Chapter 644, will hold a public hearing on August 8, 2006, at 9:00 a.m, at the Texas Department of Public Safety, Texas Highway Patrol Division, Building G Annex, 5805 North Lamar, Austin, Texas. The purpose of this hearing is to receive comments from all interested persons regarding adoption of the proposed amendments to Administrative Rule §4.1 regarding Hazardous Material and Transportation Safety, proposed for adoption under the authority of Texas Government Code, §411.018, and Texas Transportation Code, Chapter 644, which provides that the director shall, after notice and a public hearing, adopt rules regulating the safe operation of commercial motor vehicles.

Persons interested in attending this hearing are encouraged to submit advance written notice of their intent to attend the hearing and to submit a written copy of their comments. Correspondence should be addressed to Major Mark Rogers, Texas Highway Patrol Division, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0500.

Persons with special needs or disabilities who plan to attend this hearing and who may need auxiliary aids or services are requested to contact Major Rogers at (512) 424-2116 at least three working days prior to the hearing so that appropriate arrangements can be made.

Other comments on this proposal may be submitted to Mark Rogers, Major, Texas Highway Patrol Division, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0500, (512) 424-2116.

The amendments are proposed pursuant to Texas Government Code, §411.018, which authorizes the director to adopt all or part of the federal hazardous materials rules by reference; and Texas Transportation Code, §644.051, which authorizes the director to adopt all or part of the federal safety regulations by reference.

Texas Government Code, §411.018 and Texas Transportation Code, §644.051 are affected by this proposal.

§4.1. Transportation of Hazardous Materials.

(a) The director of the Texas Department of Public Safety incorporates, by reference, the Federal Hazardous Materials Regulations, Title 49, Code of Federal Regulations, Parts 107 (Subpart G), 171 - 173, 177, 178, and 180, including all interpretations thereto, for commercial vehicles operated in intrastate, interstate, or foreign commerce, as amended through July [~~February~~] 1, 2006. All other references in this section to the Code of Federal Regulations also refer to amendments and interpretations issued through July [~~February~~] 1, 2006.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 14, 2006.

TRD-200603743
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 27, 2006
For further information, please call: (512) 424-2135

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SUBCHAPTER B. REGULATIONS GOVERNING TRANSPORTATION SAFETY

37 TAC §§4.11 - 4.14, 4.19, 4.21

The Texas Department of Public Safety proposes amendments to Chapter 4, Subchapter B, §§4.11 - 4.14, 4.19 and 4.21, concerning Regulations Governing Transportation Safety.

The amendment to §4.11 is necessary in order to update the rule so that it reflects July 1, 2006 in subsection (a). The amendment is necessary to ensure that the Federal Motor Carrier Safety Regulations, incorporated by reference in the section, reflect all amendments and interpretations issued through that particular date.

The amendment to §4.12 is necessary in order to clarify when the medical standards exemption is applicable to drivers transporting hazardous materials in intrastate commerce. Additional amendments are being made to §4.12 to correct inaccuracies in citing certain parts of the Code of Federal Regulations.

Amendments to §4.13 are necessary in order to clarify the certification requirements for inspections conducted on vehicles transporting hazardous materials in Other Bulk Packaging.

Amendment to §4.14 is necessary in order to clarify that municipal and county agencies that are certified to enforce the federal safety regulations must respond in a timely manner to all challenges of the accuracy of data shown on a inspection.

Amendments to §4.19 and §4.21 are necessary in order to correct typographical errors within the sections.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rules are in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Ybarra also has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be to ensure to the public greater compliance by motor carriers with all of the statutes and regulations pertaining to the safe operation of commercial vehicles in this state. There is no adverse economic impact anticipated for individuals, small businesses, or micro-businesses.

The Texas Department of Public Safety, in accordance with the Administrative Procedures and Texas Register Act, Texas Government Code, §§2001 *et seq*., and Texas Transportation Code, Chapter 644, will hold a public hearing on August 8, 2006, at 9:00 a.m, at the Texas Department of Public Safety, Texas Highway Patrol Division, Building G Annex, 5805 North Lamar, Austin, Texas. The purpose of this hearing is to receive comments from all interested persons regarding adoption of the proposed amendments to Administrative Rules §§4.11 - 4.14, 4.19 and 4.21 regarding Hazardous Material and Transportation Safety, proposed for adoption under the authority of Texas Transportation Code, Chapter 644, which provides that the director shall, after notice and a public hearing, adopt rules regulating the safe operation of commercial motor vehicles.

Persons interested in attending this hearing are encouraged to submit advance written notice of their intent to attend the hearing and to submit a written copy of their comments. Correspondence should be addressed to Major Mark Rogers, Texas Highway Patrol Division, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0500.

Persons with special needs or disabilities who plan to attend this hearing and who may need auxiliary aids or services are requested to contact Major Rogers at (512) 424-2116 at least three working days prior to the hearing so that appropriate arrangements can be made.

Other comments on this proposal may be submitted to Mark Rogers, Major, Texas Highway Patrol Division, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0500, (512) 424-2116.

The amendments are proposed pursuant to Texas Transportation Code, §644.051, which authorizes the director to adopt rules regulating the safe transportation of hazardous materials and the safe operation of commercial motor vehicles; and authorizes the director to adopt all or part of the federal safety regulations, by reference.

Texas Transportation Code, §644.051 is affected by this proposal.

§4.11. General Applicability and Definitions.

(a) General. The director of the Texas Department of Public Safety incorporates, by reference, the Federal Motor Carrier Safety Regulations, Title 49, Code of Federal Regulations, Parts 40, 380, 382, 385, 386, 387, 390 - 393, and 395 - 397 including all interpretations thereto, as amended through July [~~February~~] 1, 2006. All other references in this subchapter to the Code of Federal Regulations also refer to amendments and interpretations issued through July [~~February~~] 1, 2006. The rules adopted herein are to ensure that:

(1) - (4) (No change.)

(b) - (c) (No change.)

§4.12. Exemptions and Exceptions.

(a) Exemptions. Exemptions to the adoptions in §4.11 of this title (relating to General Applicability and Definitions) are made pursuant to Texas Transportation Code, §§644.052 - 644.054, and are adopted as follows:

(1) - (2) (No change.)

(3) Drivers in intrastate commerce who are not transporting placardable hazardous materials and were regularly employed in Texas as commercial vehicle drivers prior to August 28, 1989, are not required to meet the medical standards contained in the federal regulations.

(A) - (B) (No change.)

(4) - (7) (No change.)

(b) (No change.)

§4.13. Authority to Enforce, Training and Certificate Requirements.

(a) (No change.)

(b) Training and Certification Requirements.

(1) - (3) (No change.)

(4) Other Bulk Packaging. Certain peace officers from the municipalities and counties specified in subsection (a) of this section and eligible to enforce the Other Bulk Packaging requirements must:

(A) - (B) (No change.)

(C) successfully complete the Cargo Tank Inspection Course;

(D) [~~(C)~~] successfully complete the Other Bulk Packaging Course; and

(E) [~~(D)~~] participate in an on-the-job training program following this course with a certified officer and perform a minimum of 16 level I inspections on vehicles containing hazardous materials in other bulk packaging. These inspections should be completed as soon as practicable, but no later than six months after course completion.

(5) - (7) (No change.)

(c) (No change.)

§4.14. Municipal and County Certification Requirements.

(a) Certain peace officers from an authorized municipality or county may be trained and certified to enforce the federal safety regulations provided the municipality or county:

(1) - (5) (No change.)

(6) provides all roadside inspection data to the department through electronic systems that are compatible with the department's system within 15 business days of the inspection, and forwards paper copies immediately thereafter; [~~and~~]

(7) agrees to forward crash reports involving commercial motor vehicles to the department no later than 30 days after the date of completion of the crash investigation; and[~~,~~]

(8) agrees to investigate and determine whether a correction to the data needs to be made when that data is challenged; to notify the motor carrier and the department in writing of the results of the investigation within 10 working days; and then to make any needed corrections and forward the corrected reports to the department immediately.

(b) - (e) (No change.)

§4.19. Administrative Action by the Texas Department of Transportation.

(a) (No change.)

(b) This determination may be based upon the following:

(1) (No change.)

(2) multiple violations of Texas Transportation Code, Chapter 644, a rule adopted under Texas Transportation Code, Chapter 644, or Texas Transportation Code, Subtitle C (Relating to Rules of the Road);[~~,~~] and/or

(3) (No change.)

(c) - (d) (No change.)

§4.21. Reports of Valid Positive Results on Alcohol and Drug Tests.

(a) Reporting Requirement. An employer required under the federal safety regulations to conduct alcohol and controlled substance testing of employees shall report to the department a valid positive result on an alcohol or controlled substance test performed as part of the carrier's alcohol and drug testing program or consortium, as defined by Title 49, Code of Federal Regulations, Part 382, on an employee of the carrier who holds a commercial driver license issued under Texas Transportation Code, Chapter 522.

(1) (No change.)

(2) The report must be submitted on a form prescribed by the department that is available at the following Internet web site address: http://www.txdps.state.tx.us/forms. All information requested on the form must be completed. The completed form must be mailed to MCCA Section Supervisor, Motor Carrier Bureau, Texas Department of Public Safety, 6200 Guadalupe, MSC# 0522, Austin, Texas 78752-4019, or sent by facsimile to (512) 424-5310. Unless the report is for a refusal to submit a sample, employers must also attach a legible copy of either the Federal Drug Testing, Custody and Control Form (with at least steps one through six completed), the U. S. Department of Transportation (DOT) Alcohol Testing Form (with at least steps one through three completed), or the Medical Review Officer's or Breath Alcohol Technician's report of a positive, diluted, adulterated, or substituted alcohol or drug test.

(3) - (5) (No change.)

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 14, 2006.

TRD-200603744
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 27, 2006
For further information, please call: (512) 424-2135

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PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 151. GENERAL PROVISIONS

37 TAC §151.51

The Texas Board of Criminal Justice proposes an amendment to Title 37, Part 6, Chapter 151, General Provisions, §151.51, concerning Custodial Officer Certification and Hazardous Duty Pay Eligibility Guidelines.

Charles Marsh, Chief Financial Officer for the Texas Department of Criminal Justice, has determined that for the first five years the rule will be in effect, enforcing or administering the rule will not have foreseeable implications related to costs or revenues for state or local government.

Mr. Marsh has also determined for the first five-year period that there will not be an economic impact on persons required to comply with the rule. There will not be an effect on small or micro businesses. The anticipated public benefit, as a result of enforcing the rule, will be accurately reflect eligibility guidelines for custodial officer certification and hazardous duty pay.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this rule.

The amendments are proposed under Texas Government Code, Chapter 659, Subchapter L and §813.506.

Cross Reference to Statutes: Texas Government Code, §§508.001, 811.001, 815.505, and the General Appropriations Act.

§151.51. Custodial Officer Certification and Hazardous Duty Pay Eligibility Guidelines.

(a) Purpose. The purpose of this rule is to establish eligibility criteria for authorizing custodial officer certification and hazardous duty pay to employees of the Texas Department of Criminal Justice (TDCJ or [~~(hereinafter,~~] Agency), under the authority of the Texas Government Code, §508.001, §615.006, Chapter 659, Subchapter L [~~D, §§659.062~~], §§811.001, 813.506, and 815.505; and the General Appropriations Act. In accordance with these provisions and in keeping with the responsibilities of the Texas Board of Criminal Justice (Board), [~~Board,~~] this rule relating to custodial officer certification and hazardous duty pay applies effective August 13, 2004.

(b) Definitions. The following words and terms, when used in this rule, shall have the following meanings unless the context clearly indicates otherwise:

(1) Custodial Officer Certification--Service certification to the Employees Retirement System of Texas (ERS) for those employees whom the Agency has determined are eligible for custodial officer service credit, which provides an additional retirement incentive when such employees have 20 or more years of such service credit.

(2) Custodial Officer Service Credit--Credit in the ERS for service performed by an employee who is in a position that has been classified as a Hazardous Duty Code 1, 2, 3, 4, 5, 6, 7 or 9 position in accordance with the provisions of this Board Rule.

(3) Direct Offender Contact--Contact with, and in the close proximity to, offenders without the protection of bars, doors, security screens, or similar devices while performing job duties. Such contact normally involves supervision or the potential for supervision of offenders in offender housing areas, educational or recreational facilities, industrial shops, kitchens, laundries, medical areas, agricultural shops or fields, or in any other areas on or away from Agency property.

(4) Offender--For the purpose of custodial officer certification and hazardous duty pay, an inmate confined in [~~the~~] TDCJ Correctional Institutions Division facilities. [~~institutions or an inmate or defendant confined in the TDCJ state jails.~~]

(5) Releasee--A person released on parole or to mandatory supervision.

(6) Routine Direct Offender Contact--Direct offender contact that is regularly planned or scheduled while conducting Agency business. Routine direct offender contact does not include travel time, unless the employee is responsible for the transportation and custody of offenders, and does not include casual contact.

(c) Procedures.

(1) Custodial Officer Certification. Employees in the following positions are eligible for custodial officer certification:

(A) Hazardous Duty Code 1 Positions. These positions are classified as Correctional Officer I through Warden II;

(B) Hazardous Duty Code 2 Positions. These positions are all positions assigned to a unit, other than Hazardous Duty Code 1 positions, that have job duties requiring routine direct offender contact. Examples include, but are not limited to, the following: Agriculture Specialist, Maintenance Supervisors, Food Service Managers, Laundry Managers, Commissary Managers[~~,~~] and Classification Case Managers;

(C) Hazardous Duty Code 3 Positions. These positions are assigned to administrative offices and have job duties requiring routine direct offender contact at least 50 percent of the time. Examples of such positions include, but are not limited to, the following: Investigators, Compliance Monitors, Accountants routinely required to audit unit operations, Sociologists, Interviewers, and Classification Officers. Requests for positions to be included in this category must be approved by the Deputy Executive Director. Employees in such positions and supervisors of such employees shall complete and submit a Hazardous Duty Log in accordance with TDCJ procedures in order to justify custodial officer certification;

(D) Hazardous Duty Code 4 Positions. These positions are administrative positions that routinely respond to emergency situations involving offenders. Examples include: the Executive Director, Deputy Director, Correctional Institutions Division Director, other Division Directors, some Managers (salary group B14 and above), and not more than 25 Administrative Duty Officers. Requests for positions to be included in this category must be approved by the Deputy Executive Director;

(E) Hazardous Duty Code 5 Positions. These positions are filled by employees whose custodial officer certification is "grandfathered" based on the following criteria in accordance with SB 993, 69th Legislature:

(i) The employees were in positions authorized custodial officer certification and hazardous duty pay on August 31, 1985;

(ii) The employees have not changed positions since August 31, 1985; and

(iii) The positions do not meet other current hazardous duty pay criteria.

(F) Hazardous Duty Code 6 Position. Employees in such positions and supervisors of such employees shall complete and submit a Hazardous Duty Log in accordance with TDCJ procedures in order to justify custodial officer certification. These positions are filled by employees whose custodial officer certification is "grandfathered" based on the following criteria in accordance with SB 1231 [~~993~~], 74th [~~69th~~] Legislature:

(i) On August 31, 1995, the employees were assigned to a Hazardous Duty Code 3 position; [~~administrative offices and had job duties requiring routine direct offender contact at least 50 percent of the time;~~] and

(ii) The employees continue to have some routine direct offender contact although it is less than 50 percent routine direct offender contact.

(G) Hazardous Duty Code 7 Positions. These positions are Parole Officers, Parole Case Managers [~~Caseworkers~~], and other employees of the Parole Division or the Board of Pardons and Paroles whose majority of assigned duties include the assessment of risks and needs, investigation, case management, and supervision of releasees to ensure that releasees are complying with the conditions of parole or mandatory supervision, or who directly supervise or are in a direct line of supervision over these employees.

(H) Hazardous Duty Code 9 Positions. Employees in such positions and supervisors of such employees shall complete and submit an Emergency Response Log in accordance with TDCJ procedures in order to justify custodial officer certification. These positions are filled by employees whose custodial officer certification is "grandfathered" based on the following criteria:

(i) On August 31, 1995, the employees were assigned to a position authorized custodial officer certification and hazardous duty pay; and

(ii) The employees have been designated as members of an Emergency Response Team that may respond to emergency situations involving offenders.

(2) Hazardous Duty Pay Authorized Positions. In addition to the employees described in paragraph (1) of this subsection, employees in the following positions may receive hazardous duty pay:

(A) employees in positions authorized for custodial officer certification;

(B) employees in Hazardous Duty Code 8 positions. These include employees and officials of the Parole Division or the Board of Pardons and Paroles who do not meet the criteria for Hazardous Duty Code 7, but have routine direct contact with offenders of any penal or correctional institution or with releasees. Examples of such positions include, but are not limited to, the following: Clerks, Administrative Assistants [~~Technicians,~~] and Laboratory Technicians assigned to Parole Field Offices.

(3) Each month the Agency shall certify to the ERS the names of the employees and any other information determined and prescribed by the ERS as necessary for the crediting of service and financing of benefits under §813.506 of the Texas Government Code.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 13, 2006.

TRD-200603737
Melinda Bozarth
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: August 27, 2006
For further information, please call: (512) 463-0422

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CHAPTER 163. COMMUNITY JUSTICE ASSISTANCE DIVISION STANDARDS

37 TAC §163.25

The Texas Board of Criminal Justice proposes an amendment to Title 37, Part 6, Chapter 163, Community Justice Assistance Division Standards, §163.25, concerning Community Justice Councils, Tasks, and Plans.

Charles Marsh, Chief Financial Officer for the Texas Department of Criminal Justice, has determined that for the first five years the rule will be in effect, enforcing or administering the rule will not have foreseeable implications related to costs or revenues for state or local government.

Mr. Marsh has also determined for the first five-year period that there will not be an economic impact on persons required to comply with the rule. There will not be an effect on small or micro businesses. The anticipated public benefit, as a result of enforcing the rule, will be to provide the public notice on the specific requirements of community justice councils, task forces, and plans.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this rule.

The amendments are proposed under Texas Government Code, §509.003 and §509.007.

Cross Reference to Statutes: Texas Government Code, §76.002 and §76.003.

§163.25. Community Justice Councils, Task Forces[,] and Plans.

(a) Purpose. In order for a jurisdiction to receive any state aid, a community justice council, task force, and the community justice plan shall [~~must~~] conform to applicable law and Texas Department of Criminal Justice (TDCJ)-Community Justice Assistance Division (CJAD) [~~TDCD-CJAD~~] standards and policy.

(b) Council's role. The local community justice council shall provide guidance and direction, in accordance with law, for the development of community justice plans.

(c) Plan development.

(1) The community justice plan shall include:

(A) a statement of goals and priorities and of commitment by the community justice council, the judges who established the department, and the community supervision and corrections department (CSCD) to achieve a targeted level of alternative sanctions; and

(B) a description of methods for measuring the success of programs provided by the CSCD or provided by an entity served by the CSCD.

(2) All community justice plans shall [~~must~~] be approved by the [~~district~~] judge(s) who established [~~manage~~] the CSCD. Unless otherwise specified by the [~~district~~] judge(s), the CSCD Director [~~director~~] or designee shall serve as the primary manager of the planning process, coordinating council activities, data collection, plan composition, and plan drafting. The community justice council, after judicial approval, shall submit the plan to the [~~TDCJ-~~] CJAD Director [~~director~~].

(d) Community justice plan acceptance and modification.

(1) Final acceptance of a community justice plan, for purposes of state aid eligibility may be conditioned upon review and evaluation by the [~~TDCJ-~~] CJAD staff. Final acceptance of plans, without conditions, shall [~~must~~] be received for purposes of [~~TDCJ-~~]CJAD grant funding.

(2) A plan may be amended through an amendment process as defined by [~~TDCJ-~~]CJAD.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 13, 2006.

TRD-200603735
Melinda Bozarth
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: August 27, 2006
For further information, please call: (512) 463-0422

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 7. BANKING AND SECURITIES

PART 8. JOINT FINANCIAL REGULATORY AGENCIES

CHAPTER 153. HOME EQUITY LENDING

7 TAC §153.22

The Finance Commission of Texas and the Texas Credit Union Commission withdraw the proposed repeal of §153.22 which appeared in the March 3, 2006, issue of the *Texas Register* (31 TexReg 1393).

Filed with the Office of the Secretary of State on July 13, 2006.

TRD-200603739
Leslie L. Pettijohn
Commissioner
Joint Financial Regulatory Agencies
Effective date: July 13, 2006
For further information, please call: (512) 936-7640

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the the rule (Government Code, §2001.036). If a rule is adopted without change to the text as published in the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 2. TEXAS ETHICS COMMISSION

CHAPTER 12. SWORN COMPLAINTS

SUBCHAPTER A. GENERAL PROVISIONS AND PROCEDURES

1 TAC §12.27

The Texas Ethics Commission adopts new §12.27, relating to deadline extensions for sworn complaints. The amendment is adopted without changes to the proposed text as published in the June 2, 2006, issue of the *Texas Register* (31 TexReg 4537) and will not be republished.

Section 12.27 gives the executive director the authority to extend sworn complaint deadlines pursuant to §571.136 of the Government Code.

No comments were received regarding the proposed rule during the comment period.

The new rule is adopted under Government Code, Chapter 571, §571.062, which authorizes the commission to adopt rules concerning the laws administered and enforced by the commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 17, 2006.

TRD-200603775
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Effective date: August 6, 2006
Proposal publication date: June 2, 2006
For further information, please call: (512) 463-5800

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SUBCHAPTER E. FORMAL HEARING

1 TAC §12.117

The Texas Ethics Commission adopts new §12.117, relating to formal hearings for sworn complaints. The amendment is adopted without changes to the proposed text as published in the June 2, 2006, issue of the *Texas Register* (31 TexReg 4537) and will not be republished.

The adopted amendment to §12.117 clarifies §571.121 of the Government Code regarding the proper venue for a formal hearing held under the sworn complaint process. Section 571.121 of the Government Code authorizes the commission to "hold hearings" without limiting the type of hearings the commission may hold. The rule would provide that the commission may hold a formal hearing either before the commission or before the State Office of Administrative Hearings (SOAH).

No comments were received regarding the proposed rule during the comment period.

The new rule is adopted under Government Code, Chapter 571, §571.062, which authorizes the commission to adopt rules concerning the laws administered and enforced by the commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 17, 2006.

TRD-200603778
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Effective date: August 6, 2006
Proposal publication date: June 2, 2006
For further information, please call: (512) 463-5800

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CHAPTER 18. GENERAL RULES CONCERNING REPORTS

1 TAC §18.9

The Texas Ethics Commission adopts an amendment to §18.9, relating to corrected reports. The amendment is adopted without changes to the proposed text as published in the June 2, 2006, issue of the *Texas Register* (31 TexReg 4538) and will not be republished.

Section 18.9 relates to the filing of corrected reports. Currently, §18.9(c) provides instances in which a corrected report is not considered late for purposes of a late fine. That provision is no longer needed because it was superseded by statutory changes made by H.B. 1800, 79th Legislature, Regular Session. The proposed rule would include a reference to the relevant sections of the law relating to "substantial compliance."

No comments were received regarding the proposed rule during the comment period.

The amendment is adopted under Government Code, Chapter 571, Section 571.062, which authorizes the commission to adopt rules concerning the laws administered and enforced by the commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 17, 2006.

TRD-200603773
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
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Proposal publication date: June 2, 2006
For further information, please call: (512) 463-5800

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CHAPTER 20. REPORTING POLITICAL CONTRIBUTIONS AND EXPENDITURES
SUBCHAPTER A. GENERAL RULES

1 TAC §20.1

The Texas Ethics Commission adopts an amendment to §20.1, relating to definitions. The amendment is adopted without changes to the proposed text as published in the June 2, 2006, issue of the *Texas Register* (31 TexReg 4539) and will not be republished.

Section 20.1 relates to Title 15 of the Election Code definitions. The amendment provides that the definition of campaign communication and the definition of political advertising do not include a communication made by e-mail. The amendment also repeals the parts of definitions that are an exact duplicate of the statute.

No comments were received regarding the proposed rule during the comment period.

The amendment is adopted under Government Code, Chapter 571, Section 571.062, which authorizes the commission to adopt rules concerning the laws administered and enforced by the commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 17, 2006.

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Natalia Luna Ashley
General Counsel
Texas Ethics Commission
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Proposal publication date: June 2, 2006
For further information, please call: (512) 463-5800

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS
SUBCHAPTER B. CUSTOMER SERVICE AND PROTECTION

16 TAC §25.43

The Public Utility Commission of Texas (commission) adopts an amendment to §25.43, relating to Provider of Last Resort (POLR) with changes to the proposed text as published in the March 10, 2006, issue of the *Texas Register* (31 TexReg 1567). The amendment revises the current POLR rule based upon the experience gained since the POLR has been in existence and implements a multiple POLR provider system to reduce the risk to a POLR provider associated with providing POLR service.

Three key elements associated with the rule amendment are: 1) the pricing structure of POLR service, 2) the selection process of the POLR providers, and 3) reducing the time required for the mass transition process by which customers of a Retail Electric Provider (REP) are transferred to POLRs.

1) The pricing structure of POLR service can be divided into two distinct categories, the POLR rate, and competitively marketed, non-POLR priced products and services. The POLR rate is meant to be a last resort pricing mechanism, as it is the intent of the commission to structure POLR service in a manner so that when customers are transitioned to a POLR provider, the POLR provider will have an opportunity to market to the transitioned customers and enroll them in their competitively available products and services, thus reducing or eliminating exposure to the POLR rate. The potential to gain customers at a relatively low acquisition cost should provide incentive to REPs to volunteer to become POLR providers. The POLR rate is designed to reflect several elements: a pass through of utility non-bypassable charges, a pass through of ERCOT charges, an additional POLR customer and demand charge (to reflect the costs to the POLR provider), and an energy charge that is 130% of the actual hourly market clearing price of energy (MCPE) with an associated price floor. For the large non-residential customer class, the POLR rate consists of a pass through of utility non-bypassable charges, a pass through of ERCOT charges, an additional POLR customer and demand charge, and an energy charge that is 130% of the 15 minute interval MCPE with an associated price floor. This POLR rate structure is similar to the current POLR rate structure for the large non-residential customer class.

2) The selection process of the POLR providers consists of creating an initial eligibility list, followed by the selection of two different types of POLR providers: volunteer POLR REPs and non-volunteering POLR providers. One of the reasons to amend the POLR rule was to reduce the risk and burden associated with serving as a POLR. Under the amended rule, the risk and burden may be eliminated entirely as volunteer POLR REPs may be able to assume responsibility for the transitioned customers without the need for the non-volunteering POLR providers to serve customers under the POLR rule. However, as POLR service is "last resort" service intended to ensure continuity of service, it is necessary to designate five non-volunteering POLR providers that will assume responsibility for any transitioned customers in excess of what the volunteer POLR REPs are capable of serving. As the non-volunteering POLR providers will be providing "last resort" service, it is necessary to designate the five largest REPs to serve in this capacity, as the five largest REPs should

be the five retail providers most able to assume the responsibility without undue hardship to them. Under the previous POLR rule, one REP could be forced into a "non-volunteering" status, so the amended rule does not create a new burden for REPs, but actually reduces the risk of that burden as five REPs will share the responsibility, as opposed to one bearing the entire risk of providing the service.

3) The desire to reduce the time frame associated with the mass transition process is of key importance for the simple reason that a mass transition to POLR providers usually represents costs to the market as a whole, because most mass transitions of customers to the POLR providers are associated with the insolvency of a REP. The longer it takes to transition the responsibility for a customer to the POLR provider, the higher the costs that will ultimately be borne by all market participants. According to the ERCOT Protocols and contracts between ERCOT and market participants, a REP, through the qualified scheduling entity (QSE) that is its representative for ERCOT billing and scheduling, is responsible to ERCOT for market services that ERCOT acquires and provides on behalf of all market participants. When a REP or QSE defaults, the amount owed represents a "short pay." The costs associated with serving the customers of the defaulting REP until the responsibility for the customer is transferred to the POLR provider is effectively added to the short pay amount. If ERCOT is unable to collect the short pay amount, it is charged to all market participants on a load ratio share basis. To reduce the amount of short pay, and the burden on the market as a whole, it is therefore important to initiate and complete the mass transition process as quickly as possible.

This rule is a competition rule subject to judicial review as specified in PURA §39.001(e). This amendment is adopted under Project Number 31416.

A public hearing on the amendment was held at commission offices on April 7, 2006. Representatives from the Association of Community Organization for Reform Now (ACORN); AARP; Texas Ratepayers' Organization to Save Energy (Texas Rose); Texas Legal Services Center (TLSC); and the general public attended the hearing and provided comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

The commission received written comments and reply comments on the proposed amendment from First Choice Power Special Purpose, L.P. (First Choice); TXU Cities Steering Committee (Cities); Joint Commenters; Retail Market Coalition (RMC); Electric Reliability Council of Texas, Incorporated (ERCOT); Tenaska Power Services Company, Sempra Energy Solutions, Coral Power, L.L.C., and Constellation NewEnergy, Incorporated (collectively TSCC); Office of Public Utility Counsel (OPC), TLSC, Texas Rose, and AARP (collectively OTTA); City of Houston (COH); Joint TDUs (TDUs); Texas Industrial Energy Consumers (TIEC); Competitive REPs (CREPs); and Public Citizen Texas Office (combined with Texas Rose and TLSC, collectively TTP). Comments were also filed by OPC, independent of OTTA.

The commission posed the following questions:

1. *In regard to the proposed POLR rate, what is the appropriate "MCPE multiplier" to be applied as the "X%" in the POLR rate formula?*

First Choice, TSCC, and RMC recommended a multiplier of 150% that would be applied to a shaped Market Clearing Price of Energy (MCPE).

Cities commented that any MCPE multiplier should not be a predetermined fixed percentage, but should be based upon a competitive bidding process from POLR suppliers and urged the commission to reject the 150% MCPE multiplier proposed by RMC, stating that it was excessive and unjustified.

RMC additionally commented that it supports an energy price floor for the residential and small non-residential customers without interval data recorder (IDR) meters, and an MCPE floor for IDR-metered customers because MCPE could potentially go negative and because the POLR rate is not intended to be a competitive offering. TSCC replied that it generally agreed with RMC's energy floor suggestion but proposed using a set price rather than a multiplier as a multiplier would make the floor unknown and it would therefore be difficult for POLRs to plan their business decisions, while a fixed price floor would provide both the POLR and customers with some degree of certainty. Additionally, if MCPE hit an extremely low or negative level, a multiplier would not result in a floor much different from the MCPE, and therefore would not serve its intended function.

In reply comments, OPC stated that the POLR should be a balance between consumer and industry interests and that the 150% multiplier was derived from trying to match the historical prices of POLR. OPC stated that the multiplier, in addition to the $25 customer charge is too avaricious. OPC commented that the MCPE is not the appropriate method of pricing POLR service for residential customers, but if the method is adopted, the formula should include a small X factor of 10 to 12 mills per kWh that is added to the otherwise applicable formula price in order to recover a REP's margin. OPC also stated in reply comments that if a variable spot pricing formula is adopted, then a weighted average of up and down MCPE for balancing energy service over an entire 30-day period should be used as that would provide a more accurate calculation and be less subject to aberrations if a longer period of time is used than the arbitrary two days per month proposed by some parties.

TSCC stated in reply comments that the proposed multiplier recovers variable energy-related charges and that a fixed adder would not compensate POLRs for the additional credit exposure that increased MCPE creates.

Commission response

The commission agrees with OPC that the POLR price should be a balance between consumer and industry interests and has crafted the POLR rate formula accordingly. The POLR rate is intended to recover the costs associated with POLR service and should not be a rate that competes with market offerings. The commission is concerned that the implementation of a 150% multiplier, in addition to customer charges, demand charges, and the flow through of wires charges creates a POLR rate that is slightly excessive and would give POLRs an incentive to keep customers on the POLR rate, and therefore has modified the multiplier to 130% of MCPE. The commission disagrees with OPC and Cities that an MCPE based formula is not the appropriate method of pricing POLR service for residential customers as the cost to serve customers is directly correlated with the MCPE. The POLR rate formula has been revised accordingly.

2. *In regard to the proposed POLR rate, what are the appropriate monthly customer charges or demand charges?*

Cities stated that the monthly customer charges and demand charges are a relatively small component of the POLR rate and should be incorporated in the overall MCPE based charge to simplify the POLR rate structure. Alternatively, Cities commented

that the charges should not be predetermined but rather should be based on competitive bids from POLR suppliers.

RMC recommended customer charges of $25 for the residential class, $50 for the small non-residential class without a demand meter or with an IDR meter, $0 for the small non-residential class with a demand meter but no IDR meter, and $2,897 for the small non-residential class with an IDR meter and the large non-residential class. RMC's recommended demand charges were $6 per kW (or kVA) for the small non-residential class with a demand meter, but no IDR meter. RMC's proposed energy charge floor for all but the small non-residential IDR metered class and the large non-residential class is a total energy charge which is the higher of 150% X MCPE or a simple average of historical POLR rates in the transmission and distribution service provider (TDSP) territory for 12 months ending in March of even-numbered years, and MCPE must be greater than or equal to $7.25 per MWh for the last two classes. RMC commented that in most months, their proposed methodology would have resulted in a POLR rate that was lower than the actual POLR rate approved by the commission.

TSCC commented that transmission and distribution charges, ancillary services charges (including RPRS Market Clearing Prices) and taxes should be passed through at cost and recommended a $6 per kW per month demand charge for the small and large non-residential classes.

Commission response

The commission disagrees with Cities that the POLR rate structure needs to be simplified for smaller customers and disagrees with the concept of a competitive bid process as such a process is inconsistent with the structure of the amended POLR rule. As there will be multiple POLR providers, it would be inappropriate to enforce the bid of one POLR provider upon all other POLR providers, as such a bid may not be representative of the costs of the other POLR providers. In addition, if the POLR rate is allowed to vary from POLR to POLR to reflect different bids from different POLR providers, then an issue arises over which customers get transitioned to which POLR providers. If the POLR rate is the same among all POLR providers, which POLR provider a customer is transitioned to is largely immaterial. Consistent with the commission response to question number 1, the POLR rate formulas have been modified accordingly to reflect a 130% MCPE multiplier and customer and demand charges of: a customer charge of $0.06 per kWh for the residential customer class; a customer charge of $0.025 per kWh and a demand charge of $2.00 per kW ($50.00 per month for customers without a demand meter) for the small and medium non-residential customer classes; and a customer charge of $2,897.00 and a demand charge of $6.00 per kW for the large non-residential customer class.

3. *In regard to the proposed POLR rate, how far in advance of billing does the rate need to be calculated? Does a customer who is to be transitioned to POLR need to know the rate at that time or is it appropriate for the rate to be calculated after service is rendered, but before a bill is issued?*

First Choice commented that the risk premium for POLRs may be mitigated to the extent that the lag between the provision of POLR service and the MCPE price used to bill the customer can be reduced. First Choice proposed addressing this lag by using a shaped MCPE for each month for each Congestion Zone (Load Zone) and the predominant load profile/Weather Zone combination on the first business day following the usage monthly cycle read date for each ESI ID. Beginning on the 3rd business day after posting of the shaped MCPE, such MCPE should be applied in calculating POLR bills. RMC stated in reply comments that it agrees with First Choice's goal to mitigate the risks of serving transitioned customers by reducing the lag between the MCPE prices but stated that REPs' billing systems cannot handle such frequent price changes and First Choice's proposal should therefore be rejected.

Cities commented that the POLR rate formula, along with indicative values of the POLR rate, should be published on the commission's website and provided by POLR suppliers to customers as soon as practical after their transfer to POLR service.

RMC recommended that for the residential and small non-residential classes, the reference price should be reset twice a month to decrease the deviation between the cost to serve POLR customers and the revenues from POLR customers. RMC further commented that the commission could increase the effectiveness of Electricity Facts Label (EFL) type information by posting historical POLR rates so that customers will have a better sense of what the POLR rates have been over time.

TSCC commented that any firm rate would have to be significantly augmented by risk premiums and would have the potential to overcharge customers or to under-compensate POLRs. TSCC stated that a transparent formula for deriving a POLR rate provides sufficient information for prospective POLR customers and recommended that the POLR notice to customers contain the formula for deriving the rate, and include the total rate from a previous period as an example.

ERCOT stated in reply comments that it strongly encourages the commission to reject RMC's recommendation and not assign the calculation task to ERCOT as the task of calculating, determining and posting POLR rates, or any rates or prices in the retail market, is outside of ERCOT's purview and range of responsibilities under PURA. ERCOT also commented that RMC's proposal calls for ERCOT to make the POLR rate information available through a programmatic interface, which would require a system change for ERCOT of unknown scope and expense.

Commission response

The commission agrees with attempting to match the cost of POLR service with the amount POLR customers are charged. The commission agrees with RMC that multiple monthly changes to the POLR rate for smaller customers is inappropriate. The POLR rate formulas have been modified consistent with previous commission responses. The commission agrees with Cities that the POLR formula rate should be published on the commission's website and the commission agrees with TSCC that the POLR rate formula should be transparent to customers. The commission agrees with ERCOT that ERCOT should not be responsible for calculating the revised POLR rate.

4. *In regard to the small non-residential greater than or equal to 50 kW customer class, what are the appropriate customer protection rules to be waived?*

Cities commented that it was not aware of any customer protection rules that should be waived for small non-residential customers.

RMC and TSCC stated that §25.471(a)(3) already provides that the customer protection rules may be waived for commercial customers with a peak demand of 50kW or greater, with the exception of §25.495, relating to Unauthorized Change of Retail Electric Provider, §25.481, relating to Unauthorized Charges, and

§25.485(a) - (b), relating to Customer Access and Complaint Handling.

TDUs commented that it is not necessary or advisable to bifurcate and create two different POLR small non-residential customer classifications, based on a 50 kW breakpoint. TDUs commented that POLRs should only volunteer to serve the small non-residential class if they are prepared to serve customers who cannot waive customer protections and that it is unnecessary to create a separate class in order to allow the POLRs to pick and choose customers based on their own pre-defined criteria or who they would find it lucrative to serve, rather than those criteria already existing in the market. TDUs commented that market systems currently do not distinguish customer classes by a line of demarcation at 50 kW and ERCOT cannot assign customers based upon this breakpoint. In reply comments, ERCOT stated that without expressing an opinion on whether a new customer class is needed, eliminating the new proposed customer class would reduce the number of TX SET changes needed and the cost of implementing the new rule. In reply comments, TDUs stated that ERCOT correctly described the difficulty and expense that would be entailed in bifurcating and creating these new customer classes. TSCC stated in reply comments that the commission should retain the proposed new customer class so that certain customer protection rules may be waived and stated that the TDUs' assertion that only REPs who can serve customers while complying with all customer protection rules should volunteer to serve as small non-residential POLRs appears to reflect more the TDUs' desires to avoid modifying their systems than a genuine desire to improve the market or protect customers.

Commission response

The commission disagrees with the TDUs that it is not necessary or advisable to bifurcate and create two different POLR small non-residential customer classifications, based on a 50 kW breakpoint. The commission is concerned with the number of REPs that will be eligible to serve as POLR and the number that will volunteer to serve as POLR. With the bifurcation of the small non-residential customer class, the number of REPs serving as POLR should be increased. The commission agrees with RMC and TSCC that §25.471(a)(3) provides that the customer protection rules may be waived for customers with a peak demand of 50kW or greater, with the exception of §25.481, §25.485(a) - (b), and §25.495.

5. *In regard to the eligibility criteria to serve as a POLR, are the proposed 1% threshold values too low (or too high)?*

Cities recommended that the threshold be established as a percentage of historical POLR customer levels in each area rather than as 1% of total customers in a like customer class.

RMC and TSCC commented that the 1% threshold is appropriate for determining eligibility to serve as a volunteer POLR REP and would permit a wide spectrum of REPs to serve as POLR in a voluntary capacity. RMC commented that for non-volunteering POLR providers the threshold should be 3% or more of the total MWh served in the TDSP service area for a customer class for the 12-month period ending March of the year that POLRs are designated. RMC stated that the rationale for this position was that it is essential that non-volunteering POLR providers be sufficiently sized and experienced to handle mass transitions of POLR customers.

TSCC suggested that the threshold eligibility level for non-voluntary POLRs should be 5%. In reply comments TSCC stated that while RMC advocated a 3% threshold and TSCC proposed a 5% threshold, the important point is that the commission should require only those REPs who have a pre-existing capability to serve a particular customer class to become a POLR for that class. TSCC replied that RMC's suggestion to use MWhs served rather than customer numbers has some merit, but a REP might serve a significant amount of load in a particular class attributable to only a handful of customers, therefore TSCC recommended that using a mix of factors so that the commission would consider the REP's customer numbers as well as MWh served would be appropriate.

Commission response

The commission disagrees with the recommendation of Cities as the historic level of POLR customers may not be an indicator of future POLR customers, but the commission is concerned with the number of REPs that will be eligible under a 3%, 5%, and even a 1% threshold. The commission agrees with TSCC that using a mix of factors is appropriate to ensure that a REP is capable of serving as a POLR and that the eligibility requirements are not so strict that the pool of potential POLR providers is extremely limited. The eligibility criteria have been modified accordingly.

6. *In regard to the eligibility criteria to serve as a POLR, what should be the minimum financial qualifications that a REP must demonstrate to the commission?*

Cities commented that financial qualifications of POLR candidates should be evaluated by the commission on a case by case basis and considered as one of the factors in the award of eligible POLR providers. Cities stated that the commission should seek information from each POLR candidate regarding its financial performance, instances of default, and willingness to offer financial guarantees from lenders or parent companies to support their proposed POLR service.

RMC and TSCC commented that the REP certification procedures and requirements found in §25.107 define the minimum financial qualifications to serve as a REP and that the same qualifications should apply to POLR service providers as well. RMC replied that it disagreed with the recommendation of Cities, consistent with its initial comments.

TTP commented that if the REP certification process did a better job of screening applicants there would be fewer defaults and even the poor POLR pricing structure currently in place would not be as big an issue as it is today and will be after January 1, 2007. TTP commented that the commission should raise the standards and credit requirements for REP certification in the Texas market. TDUs stated in reply comments that it agrees with TTP that certification standards for REPs should be strengthened, which would decrease the likelihood of REP defaults, reduce the negative experience and costs for customers, and make the issues addressed in this rulemaking less significant.

Commission response

The commission agrees with RMC and TSCC that the REP certification qualifications should apply to POLR service providers but disagrees with the concept that once a REP is certified it can serve as a POLR without additional scrutiny. The commission agrees with Cities that financial qualifications of POLR candidates should be evaluated by the commission on a case by case basis when the POLR eligibility list is created. When the POLR eligibility list is created, the commission shall determine that a REP continues to meet the certification standards as well as consider information concerning financial performance, instances of

default, and other relevant financial information before the REP is placed on the POLR eligibility list. The commission agrees with TTP and TDUs that stronger REP certification standards would probably decrease the likelihood of customers being transitioned to POLR providers due to a REP failure, but notes that revisions to commission Substantive Rule §25.107 - *Certification of Retail Electric Providers (REPs)*, is outside the scope of Project Number 31416.

7. *Should customers who are served by a POLR provider because their chosen REP is no longer serving them be able to request an out-of-cycle meter read without being charged the applicable transmission and distribution utility discretionary charge for the service? If so, what is the appropriate cost recovery methodology that should be used to compensate the transmission and distribution utility for performing the service?*

Cities stated that there is no apparent justification for singling out and subsidizing the cost attributable to this particular risk, by allowing customers to obtain out-of-cycle meter reads without paying for the service.

RMC stated that if TDSP's are required to waive out-of-cycle meter read fees when customers switch from POLR, new market rules and system changes would be necessary as there is currently no way for the TDSP to know that the switch is a switch away from POLR and that the out-of-cycle meter read fee should be waived. In addition, RMC commented that it opposed any TDSP surcharges or temporary rate riders to recover waived fees because those measures would constitute piece-meal ratemaking.

TSCC stated that if customers want an out-of-cycle meter read, the customer can pay the TDSP tariff charge for having one done and TSCC does not see any public policy reason why the charge should be waived.

TDUs stated in initial and reply comments that the charges incurred for an out-of-cycle meter read should be billed to the gaining REP, as is currently the case under the Tariff for Retail Delivery Service and that there may be no need for a switch from the POLR to a new REP as the goal of the rule is to allow volunteer POLR REPs to market to keep or gain new customers and make POLR service more attractive. TDUs also commented that requiring out-of-cycle meter read costs be included in transmission and distribution utility (TDU) general base rates is inequitable to the remainder of the TDU ratepayers because it forces other ratepayers to fund such meter reads when the switching ratepayer has the option to switch on-cycle at no additional meter read cost. TDUs stated in initial and reply comments that cost recovery for out-of-cycle meter reads is problematic through a general base rate case because it would be difficult to gauge as "known and measurable" the costs on an ongoing yearly basis. TDUs commented that they support proposed amended §25.43(e)(3)(D) and (s)(2)(G) that obligate POLRs to notify and inform customers that acceleration of switches to another REP that may be accomplished through a "special or out-of-cycle meter read" would involve an applicable transmission and distribution utility charge for the meter read. In reply comments, TDUs stated that RMC correctly points out that a REP may currently pass on to its customer a TDU tariffed charge for out-of-cycle switch requests, and TDU charges for out-of-cycle meter reads associated with a customer switch from the POLR to another REP should be treated the same way. TDUs also stated in reply comments that no public policy reason justifies waiver of fees associated with out-of-cycle meter reads performed in this instance.

Commission response

The commission agrees that it is not appropriate to subsidize the costs associated with an out-of-cycle meter read by adding the costs to TDU non-bypassable rates. The commission notes that in accordance with Project Number 29637 - *Rulemaking To Amend P.U.C. Substantive Rule §25.214 And Pro-Forma Retail Delivery Tariff*, when a REP transitions customers to POLR providers, the exiting REP is responsible for the associated meter reading charges. If a customer then desires an out-of-cycle meter read to switch to a new REP of choice from the POLR provider, the applicable TDU charge will be applied to the new REP.

8. *Is the selection methodology appropriate for volunteer POLR REPs and, if not, how should it be modified to encourage REP participation?*

Cities stated that there was no justification for making the Affiliated Retail Electric Provider (AREP) ineligible for selection as a volunteer POLR REP and stated that the AREP may be the best situated to provide POLR service and may offer the most attractive rate for such service. Cities recommended that the volunteer POLR REP selection and designation process be based on a more competitive process that considers REP price bids based on providing POLR service at a guaranteed percentage of MCPE, plus adders for a specified amount of load, as REPs may be willing to provide competitive offers to serve all or a portion of the POLR load.

RMC commented that ERCOT will be allocating electric service identifier numbers (ESI IDs), not customers, to the receiving POLRs and stated that the best approach for allocating ESI IDs to multiple POLRs when there is a mass transition would be to base the allocation on the MWh represented by the ESI IDs being transferred. RMC also commented that any system that mandates that the smallest volunteer POLR REP receive all the new load it volunteers for before the next volunteer POLR REP receives any discriminates against the larger volunteer POLR REPs. RMC recommended that each volunteer POLR REP be required to submit, by customer class and POLR area, the number of additional ESI IDs it is willing to take as a volunteer POLR REP each time there is a mass customer transition, and ESI IDs be randomly allocated to all volunteer POLR REPs based on the percentage of ESI IDs each volunteer POLR REP specified in its submission to the commission.

ERCOT replied that it believes that the cost and effort involved with an allocation methodology made on the electric consumption (MWh) represented by the ESI IDs outweigh the benefits of the approach. ERCOT's current method of aggregating consumption data does not provide for continuous banking of consumption data at the ESI ID level, and the system changes needed to obtain this data would have a tremendous impact on system performance and data storage needs. The use of the number of ESI IDs as a limit on participation should be sufficient. ERCOT noted that the methodology proposed by RMC eliminates much of the ambiguity contained in the methodology in the proposed rule. In particular, RMC's methodology clarifies that the volunteer POLR REP limit on the number of ESI IDs that it would accept is applicable to each mass customer transition.

Commission response

The commission agrees with Cities that AREPs should be eligible to serve as volunteer POLR REPs and notes that nothing in the rule prohibits AREPs from serving as such. The commission disagrees with Cities that volunteer POLR REPs should

be based upon a competitive process as the recommendation is inconsistent with the overall structure of the rule. The commission agrees with ERCOT that the number of ESI IDs as a limit on volunteer POLR REP participation is sufficient, but notes that volunteer POLR REPs must be prepared for the varied load that different ESI IDs may represent, and factor this variable into their determination of their level of volunteer POLR participation. The commission agrees to revise the allocation methodology language to eliminate concerns over discrimination and agrees that the recommendation of RMC is an appropriate nondiscriminatory methodology, but the commission does note that the recommendation of RMC could effectively push smaller volunteer POLR REPs out of the equation if larger volunteer POLR REPs effectively dominate the volunteer pool. As experience is gained, the allocation methodology may need to be revised in a future proceeding. The allocation methodology language has been modified accordingly to address potential discrimination concerns.

Public Hearing Comments

Texas Rose filed comments in conjunction with the April 7, 2006, public hearing in this project. The filed comments restated the positions summarized elsewhere in this document and are not repeated in this section. The public hearing comments of Texas Rose also included example bills, electricity facts labels, and related documents as support for its stated positions.

Representatives from ACORN, AARP, Texas Rose, TLSC, and the general public attended the Public Hearing and provided comments and testimonials about their experiences with the current costs of electricity. In general, all that commented requested rule revisions that would enhance the ability of customers to purchase electricity at an affordable price. No comments specific to proposed rule language were received.

Comments on the proposed amendment to §25.43.

§25.43(a) - Purpose

RMC recommended that the policy embodied in proposed subsection (n)(12)(E) of this section be elevated to the purpose and application subsections of the rule and stated that the commission should re-examine its policy on the purpose of the POLR and ensure that POLR services exist only in two situations, when a customer chooses POLR, and for continuity of service due to a REP default. RMC stated that POLR service as it relates to termination of customers from other REPs for reasons other than REP default does not reflect good public policy and should be deleted. In reply comments, OPC opposed the recommendation of RMC.

TSCC commented that (a)(2) needs to be revised because the current rule incorrectly states that all customers will be assured continuity of service if a REP terminates service in accordance with the termination provisions of the customer protection rules. TSCC therefore recommended that (a)(2) be revised to exclude non-paying customers from the assurance of continuity of service. In reply comments, TSCC stated that with the new disconnection rules, REPs should simply disconnect customers rather than passing them on to POLR providers. RMC replied that it agreed with the rationale underlying the recommendation of TSCC to clarify that customers disconnected for non-payment are not assured continuity of service.

Commission response

The commission conceptually agrees with the comments of RMC and TSCC. Currently, Commission Substantive Rule §25.483 addresses disconnection of service. As §25.483 contains requirements to obtain disconnection authority, all REPs may not have that authority. Commission Substantive Rule §25.482 addresses termination of contract for REPs that do not have disconnect authority. In the instance of termination, the rule specifically provides that the customer is to be transferred to the AREP for non-payment issues and to a POLR provider for reasons other than non-payment. Commission Substantive Rules §25.482 and §25.483 are outside the scope of this project and cannot be changed here, but it is the intent of the commission that as of January 1, 2007, customers are no longer transitioned to POLR service for reasons other than the request of the customer, or to ensure continuity of service when the customer's REP fails to provide service. The rule language has been modified to indicate that the portions of the rule that relate to termination of service shall not be applicable after January 1, 2007, and it is the intent of the commission to modify §25.482 and §25.483 accordingly, in a subsequent project.

§25.43(b) - Application; termination of service for non-payment

TSCC recommended that the provisions of the proposed rule, except for those relating to the selection of POLRs, should become effective January 1, 2007. RMC stated in reply comments that subsections (l) and (n) of this section along with the POLR selection criteria should become effective 20 days after the adopted rule is published in the Texas Register in accordance with the Administrative Procedure Act, §2001.036. ERCOT replied that in the best-case scenario, it could implement changes to TX SET, no earlier than March 31, 2007, and strongly recommended that no specific deadlines be imposed upon it to make changes required by this rule.

Commission response

The commission notes that the rule will become effective 20 days after the adopted rule is submitted to the Secretary of State, in accordance with the Administrative Procedure Act, §2001.036. The rule language has been modified where appropriate to indicate if portions of the rule will not be able to be implemented until a later date, for reasons such as required Texas SET changes, and when it is not appropriate for portions of the rule to be implemented until a later date, such as the POLR rate and the Standard Terms of Service.

TSCC commented that if (b)(2) is intended to require all REPs who terminate electric service to a customer for non-payment to transfer the customer to a POLR instead of requesting disconnection, TSCC strongly objects to that proposal. RMC replied that it does not agree with TSCC's proposed revision to subsection (b)(2) of this section, finding that proposed change internally inconsistent with the appropriate policy objectives for POLR service that TSCC articulated.

Commission response

Consistent with its previous discussion, the commission clarifies that §25.482 requires REPs that do not have disconnection authority to transfer customers to the AREP for non-payment and to a POLR provider for issues other than non-payment. The argument of TSCC implies that all REPs have disconnection authority, but that is not correct. However, it is the commission's intent that as of January 1, 2007, REPs shall not transfer customers to the AREP for non-payment and shall not transfer customers to a POLR provider for issues other than non-payment, per §25.482. The rule language has been modified accordingly to clarify this intent.

OTTA commented that (b)(3) is in conflict with (a)(1) and the statute. RMC replied that nothing in the proposed language is in direct conflict with PURA §39.109 or any other provision in the statute, and is, in fact, wholly consistent with PURA §39.106(g), which provides that in the event a REP fails to serve its customer, the POLR provider shall offer service to the customer without any interruption.

OTTA recommended that the purpose of POLR service after the end of the Price to Beat service should be to provide basic generation service at a reasonable price and on reasonable terms and conditions. TTP generally agreed as it stated in initial and reply comments the need for an affordable rate package for low-income consumers. TTP further stated that to be able to afford electricity, and medicine and food, low-income Texans need a rate that is more reflective of electricity rates when the market was originally opened to competition. In reply comments, Cities agreed with OTTA that POLR service should be redesigned to provide a basic default generation service at a reasonable price with reasonable terms for customers who do not choose an alternative supplier or whose service is terminated due to REP default or for any other reason. Cities further stated that by awarding the contract for such service to one or two suppliers in each TDSP region, the attractiveness of such loads could be greatly improved and the prospects of obtaining a reasonably priced, competitively procured default service product for small customers could be increased. RMC replied that OTTA's contention that POLR service is the means by which a customer's entitlement to "reasonably priced electricity" in PURA §39.101(a)(1) is achieved is simply incorrect. RMC stated that under PURA, it is competition, not POLR service, that provides "reasonably priced electricity" under PURA §39.101(a)(1). RMC stated in reply comments that the Legislature mandated that the commission establish a POLR rate that is a "standard retail service package," (PURA §39.106(b)) not an "affordable rate package." (PURA §17.004(a))

Commission response

The commission disagrees that subsections (a)(1) and (b)(3) are in conflict and declines to make a change. The commission disagrees with OTTA and Cities that the purpose of POLR should be to provide "reasonable" electric prices. The commission restates that in accordance with (b)(3), the purpose of POLR is to ensure continuity of service. The commission appreciates the situation described by TTP, but notes that there is no authority to return rates to a level that is not based upon current conditions. The commission disagrees with the "awarded contract" approach of Cities as it is inconsistent with overall design of the POLR rule and would remove customers from the AREP, in violation of PURA §39.102(b).

§25.43(c) - Definitions

ERCOT commented the "small non-residential less than 50 kW" and "small non-residential greater than or equal to 50 kW" customer classes be renamed to "small non-residential customer" and "medium non-residential customer" respectively. ERCOT also recommended that since the terms "non-volunteering POLR providers" and "volunteer POLR REPs" are used throughout the rule, the terms should be defined and included in subsection (c) of this section. RMC replied that it agreed with ERCOT to rename the proposed two division of the small non-residential customer class to "small non-residential customer" and "medium non-residential customer."

RMC commented that the definition of POLR in subsection (c)(7) of this section, is inconsistent with the application of this rule, as set forth in the proposed amendment to subsection (b)(2) of this section. While proposed subsection (b)(2) of this section indicates that a nonpaying customer will be served by a POLR following the expiration of the price to beat period, the definition of POLR in subsection (c)(7) of this section states that non-payment is the only reason a REP may not transfer a customer to POLR.

Commission response

The commission agrees with ERCOT and RMC that additional clarity would be gained by re-naming the bifurcated small non-residential customer class and has modified the rule language accordingly. The commission agrees with ERCOT that non-volunteering POLR providers and volunteer POLR REPs should be added to the list of definitions. The commission agrees with RMC that there is an inconsistency in the definition in subsections (c)(7) and (b)(2) of this section. Consistent with previous commission clarification, the rule language has been modified to clarify the intent that under §25.482, REPs without disconnect authority may only transfer customers to a POLR provider for reasons other than non-payment, though it is the intent of the commission that termination of customers to POLR service for reasons other than non-payment shall not be applicable as of January 1, 2007.

§25.43(d) - POLR service

OTTA stated that "former PTB customers" should be transferred to a POLR whose prices should be established through a competitive process based on the statutory obligation to provide a fixed rate and affordable rate package to residential customers. RMC replied that it is noteworthy that OTTA recommended that residential POLR service be priced based on a non-market, integrated resource planning-type portfolio of electricity contracts which is a design that has yielded disastrous results in many of the states OTTA cites. RMC stated in reply comments that the proposal to create a POLR service that would serve all former PTB customers is unlawful as PURA §39.101(b)(2) states that a customer should be entitled to "assume that the customer's chosen provider will not be changed without the customer's informed consent." In addition, PURA §39.102(b) states that "the affiliated retail electric provider of the electric utility serving a retail customer on December 31, 2001, may continue to serve that customer until the customer chooses service from a different retail electric provider."

Commission response

The commission agrees with the argument of RMC and declines to implement a POLR structure that would move former price to beat customers to POLR service upon the expiration of price to beat. Such a POLR design would be inconsistent with PURA §39.101(b)(2) and §39.102(b).

ERCOT commented that the ERCOT database utilizes three classes of customers: residential, small non-residential, and large non-residential. To accommodate four classes of customers, ERCOT would need a change to TX SET and an update to its database. TDUs would need the ability to assign a new customer class through a change to TX SET, and ERCOT's database would need to be configured to capture this new information. ERCOT strongly suggested that any changes to customer class assignments resulting from the POLR rule should be implemented using current market practices as described in the ERCOT Protocols. In addition, ERCOT com-

mented that in order to manage a change from three to four classes, it would need to coordinate processing time with the TDUs to manage the large volumes of TX SET transactions that would be necessary to implement the rule change.

TSCC stated in reply comments that the commission should reject the TDU's request to have only three customer classes (see preamble question number 4), which would eliminate a POLR's ability to provide service to small non-residential customers over 50kW at terms that may differ from the customer protection rules. TSCC also stated that the commission should not place undue significance on the fact that ERCOT may need to change Texas SET to accommodate four POLR customer classes as ERCOT has made numerous changes to Texas SET to implement commission policies. TSCC stated that the added diversity in POLR providers and service that allowing small non-residential customers over 50kW to take service under terms different than the customer protection rules represents an important enhancement to the POLR system. TSCC stated that absent ERCOT providing quantification reflecting an undue cost in changing Texas SET, this factor should not dictate the commission's decision.

RMC replied that the commission should reject TDUs recommendation, as it would effectively remove all REPs who do not serve any portion of the small non-residential class from being included in the commission's selection process for non-volunteering POLR providers. Such an exclusion would place an even greater burden on all remaining eligible POLR REPs to perform POLR responsibilities for the small non-residential class. RMC stated in reply comments that it agrees with ERCOT that changes to ESI ID customer class assignment should be implemented in accordance with current ERCOT Protocols, which would require TDUs to make necessary ESI ID assignments using a TX SET transaction to update the ERCOT database. RMC urged the commission to ensure that this ESI ID assignment activity is completed no later than year-end.

Commission response

Consistent with the position stated in response to preamble question number 4, the commission agrees with the stated positions of TSCC and RMC and agrees that it will be beneficial to the market to bifurcate and create two different POLR small non-residential customer classifications, based on a 50 kW breakpoint.

The commission disagrees with TSCC that ERCOT must quantify costs before they can be considered and incorporated in a final decision. The commission is well aware of the amount of changes required by ERCOT to comply with commission rules, and while ultimately the commission must rule in a fashion it feels is correct, the cumulative effect upon ERCOT, relative to the benefit gained, is certainly an appropriate factor to consider when making a decision.

In this instance, the commission determines that the bifurcation of the small non-residential customer class would be beneficial to REPs that are only interested in providing POLR service to customers that it would not have to serve under the customer protection rules, and thus the number of REPs willing to provide POLR service should be maximized by bifurcating the small non-residential customer class.

The commission agrees with the argument of RMC that not bifurcating the small non-residential customer class could effectively remove a large number of REPs from the non-volunteering POLR provider pool, which could place a greater burden on the remaining eligible POLR REPs in regard to the small non-residential class. However, the commission notes that the rule provides for five non-volunteering POLR providers, which is a significant step toward reducing the burden on POLR REPs when compared to the one POLR provider authorized under the previous POLR structure.

ERCOT shall make every effort to implement the bifurcated small non-residential customer class as soon as possible, and in the event that ERCOT is not capable of having an automated process in place to effectuate the bifurcation by December 31, 2006, ERCOT shall manually bifurcate the small non-residential customer class until the automated process is in place, which shall be no later than July 1, 2007.

§25.43(e) - Standards of service

RMC commented that subsection (e)(2) of this section requires a POLR to serve "any customer according to the Standard Terms of Service" based on that customer's service class, and that to eliminate any possible ambiguity, the reference to "any customer" should be changed to "any POLR customer." RMC also commented that to remove any ambiguity, a sentence should be added to subsection (e)(2) of this section, stating that there is no intention to prohibit POLR customers from enrolling in a non-POLR product provided by the REP serving as POLR or by a REP affiliated with the POLR.

TSCC commented that for clarity, the phrase "as described in subsection (d)(2) of this section" be moved to modify the word "customer" in the first line. TSCC commented that it did not have an objection to the proposal to allow volunteer POLR REPs to charge a rate less than the POLR rate. TSCC recommended that the language be further clarified to state that volunteer POLR REPs shall only be allowed to charge a rate less than the POLR rate under the conditions set out in subsection (i)(3) of this section. TSCC commented that subsection (i)(3) of this section should clearly provide that the customer protection rules do not apply to non-residential customers 50 kW and above, non-residential customers whose load is part of an aggregation in excess of 50 kW, and large non-residential customers, except for the customer protection rules that cannot be waived.

RMC commented that a clarification statement should be added to (e)(3) that if there is an inconsistency or conflict between the POLR rule and the customer protection rules, the provisions of the POLR rule will apply. RMC also commented that the requirement in (e)(3)(B) that non-volunteering POLR providers provide a list of certified REPs to every customer is duplicative and should be deleted because subsection (s)(2)(D) of this section requires POLRs to notify transitioning customers of their ability to choose an alternative provider. Likewise, RMC commented that proposed subsection (e)(3)(D) of this section should be deleted because the language with respect to the POLR customer's ability to request a special or out-of-cycle meter read is repeated later in proposed subsection (s)(2)(G) of this section.

Commission response

The commission agrees with RMC and TSCC that there is unintended ambiguity in subsection (e) of this section. The rule language has been modified to clarify the commission's intent. The commission agrees with RMC that it is not the intent of the commission to prohibit a POLR customer from enrolling in a non-POLR product provided by the REP serving as POLR or by a REP affiliated with the POLR. The commission agrees with RMC that if there is a conflict with the customer protection rules the provisions of the POLR rule will apply. The commission also

agrees with RMC that the requirements of subsection (e)(3)(B) and (D) of this section are duplicative and have been deleted.

§25.43(f) - Customer information

RMC recommended that subsection (f)(2) of this section distinguish between non-POLR customers and POLR customers by specifically limiting the requirement to new POLR customers. In addition, RMC recommended that the second sentence of subsection (f)(2) of this section be deleted because it referenced updates to the Standard Terms of Service based upon the requirements of §25.475 of this title, but RMC noted that the POLR is not allowed to change the Standard Terms of Service.

Commission response

The commission agrees with RMC that additional clarity would be gained by specifically limiting the requirement in subsection (f)(2) of this section, to new POLR customers. The commission declines to delete the second sentence of subsection (f)(2) of this section. While the commission agrees with RMC that the POLR is not allowed to change any of the provisions or the format of the Standard Terms of Service without authorization, §25.475(d) addresses items such as the REP's certified name, mailing address, Internet website address, a toll-free telephone number, and pass-through charges from the wires utility, which could change. Therefore, to the extent any information that is contained in the Standard Terms of Service changes, that document would need to be updated accordingly, when appropriate.

§25.43(h) - REP eligibility to serve as a POLR

RMC recommended that an affirmative statement that a REP is eligible unless rendered ineligible by one of the criteria or situations listed in the rule because the subsection has been revised such that it lists ineligibility criteria as opposed to eligibility criteria. RMC commented that the reference to financial condition in subsections (h)(1) and (h)(2)(J) of this section be eliminated. TSCC replied that consistent with preamble question number 5 it would suggest using a formula that incorporates both MWhs and customer numbers.

Commission response

The commission agrees that the rule would benefit from a statement clarifying that a REP is eligible unless rendered ineligible by one of the criteria or situations listed in the rule and has modified the language accordingly. The commission declines to delete the references to "financial condition" as the commission is concerned with a "cascading effect" of customers being transitioned to POLR providers, which then places the POLR provider in a position of default. The language has, however, been modified as a result of other clarification efforts. Consistent with the response to preamble question number 5, the commission agrees with TSCC that using a mix of factors is appropriate to ensure that a REP is capable of serving as a POLR and that the eligibility requirements are not so strict that the pool of potential POLR providers is extremely limited. The eligibility criteria have been modified and clarified accordingly.

TSCC recommended that the date for the required filing in subsection (h)(1) of this section be moved up to June 1 of each even-numbered year and urged that a date certain of July 1 be added to subsection (h)(3) of this section for the publication of the eligible REP list. TSCC commented that if, given the effective date of the revised POLR rule, TSCC's recommended timeline is not workable for 2006, the rule should require that timeline for all even-numbered years after 2006, and a timeline for 2006 that is as close as possible given the effective date of the rule. TSCC commented that the information required to be provided should include the number of customers served in each class, as well as the number of meters served in each class. This information is necessary if the commission is to make an eligibility determination pursuant to paragraph (2)(B) and (C) based on the number of customers and the number of meters served by TDU service area. RMC replied that it does not advocate a modification to the July 10th deadline in proposed subsection (h)(1) of this section and proposes that the commission publish the REP eligibility list on or before September 1st of even-numbered years but noted that the commission may need to establish specific deadlines for 2006 that will ensure that POLRs will be ready to provide service at the outset of the upcoming 2007 - 2008 POLR term. RMC stated in reply comments that TSCC's proposal to require REPs to provide information with respect to the number of customers and the number of meters by customer class is unnecessary because RMC advocated in its initial comments that the REPs file information with respect to the amount of MWh served for each customer class, which is the appropriate eligibility measurement to be used rather than measurements based on the number of customers or meters.

Commission response

The commission declines to make the adjustment to the filing date contained in subsection (h)(1) of this section. The commission believes that the stated dates are appropriate and give enough time for the next step to occur in the POLR selection process. The commission has added language to the rule that delays the POLR REP selection process time frames, for 2006, to address the concern of the adopted rules effective date in relation to the initial time frames. Consistent with previous discussion, the commission has changed the information that must be provided by the REPs to reflect the mix of factors that will be considered in determining POLR eligibility.

TSCC commented that two kinds of REPs should be considered ineligible to be required to provide involuntary POLR service; Option 2 REPs that are certified to serve only those customers who contract for 1 MW or more of capacity and sign an affidavit stating that the customer is satisfied that the REP meets the financial, technical and managerial, and customer protection standards prescribed in §25.107(f)(2), (g), and (h); and a REP currently serving a two-year term as a POLR should not be required to serve a subsequent, consecutive term as a POLR, unless the REP volunteers such service. In reply comments, TIEC and OPC supported TSCC's proposed exclusion of Option 2 REPs from POLR eligibility. RMC replied that to avoid concerns of discrimination it opposed TSCC's recommendation that non-volunteering POLR providers be exempt from a subsequent, consecutive term.

Commission response

The commission agrees with TSCC, TIEC, and OPC that Option 2 REPs should be ineligible to serve as non-volunteering POLR providers and has modified the rule language accordingly to make the ineligible status more explicit. The commission does not agree with TSCC that non-volunteering POLR providers should be exempt from serving a subsequent, consecutive term. POLR service is a condition of receiving REP certification and the commission sees no justifiable reason to exempt a REP from a subsequent, consecutive term. In addition, the commission notes that it would be unwise to remove the initial five non-volunteering POLR providers from the non-volunteering POLR provider pool for subsequent terms, as the rationale for the non-volunteering POLR provider selection process is that

the five REPs that are most likely able to handle a large mass transition that would extinguish the available voluntary POLR REP pool, are needed to fulfill that role.

RMC recommended that the eligibility test should be 1% of MWh for volunteer POLR REPs and 3% of MWh for non-volunteering POLR providers.

TSCC commented that consistent with its answers to preamble question number 5, the eligibility threshold for volunteer POLR REPs should be 1% and 5% for non-volunteering POLR providers. TSCC also commented that another way to address the issue of the only meters being served in the small, non-residential class are multiple meters belonging to a single or very few large non-residential customers, may be to define a customer by the contractual relationship between the customer and the REP, rather than the number of meters served. RMC stated in reply comments that with the exception of the 1% and 3% eligibility thresholds that RMC proposed respectively for volunteer POLR REPs and non-volunteering POLR providers, RMC supports the application of the same eligibility standards to both categories of POLRs and opposes this organizational change to proposed subsection (h)(2) of this section.

Commission response

As stated in the response to preamble question number 5, the commission is concerned with the number of REPs that will be eligible under a 3%, 5%, and even a 1% threshold. Therefore the commission has determined that using a mix of factors is appropriate to ensure that a REP is capable of serving as a POLR and that the eligibility requirements are not so strict that the pool of potential POLR providers is extremely limited. The eligibility criteria has been modified to reflect a "1% mixed factor threshold" that shall be determined by adding the numeric portion of the percentage of ESI IDs served and the numeric portion of the percentage of MWhs served. A REP that serves 0.2% of ESI IDs and 0.8% of MWhs sold shall be eligible (0.2 plus 0.8 equals 1.0), just as a REP that serves 1% of ESI IDs and any percentage of MWhs served. This "mixed factor" methodology should allow more REPs the ability to become POLR eligible and will address the problem of REPs which might serve a low number of ESI IDs that represent a relatively large amount of load, and the reverse situation of REPs which might serve a high number of ESI IDs that only represent a relatively small amount of load.

TSCC stated that in subsection (h)(2)(D) of this section, "and (C)" should be added after "subparagraph (B)."

Commission response

The commission agrees with TSCC that subsection (h)(2)(D) of this section should reference both subsection (h)(2)(B) and (h)(2)(C) of this section as the intent was applicable to both. However, consistent with previous responses, the language regarding REP eligibility has been modified accordingly, and the need to reference subsection (h)(2)(C) of this section has become moot.

TSCC recommended that in subsection (h)(2)(F) of this section, the phrase "is not certified to serve or" be deleted because, other than Option 2 REPs, the REP certification rule does not provide for certification by customer class.

TIEC stated that clarity regarding the REPs that are qualified to serve as POLRs is of additional importance as some of TIEC's member companies also have REPs that serve some limited, non-affiliated customers under the commission's "Option 2" REP certification standards, and the rule should clarify that Option 2 REPs are not eligible to serve as POLRs.

Commission response

The commission agrees with TSCC and TIEC that the rule would benefit from additionally clarity of specifically addressing Option 2 REPs and has thus revised the rule language to make the intent clearer. The commission notes that the language that TSCC recommended for deletion was intended to address the Option 2 REPs that TSCC referenced and is therefore not appropriate to be deleted, but consistent with the comments of TIEC, the commission agrees that the reference to Option 2 REPs should be more explicit.

TSCC commented that subsection (h)(2)(H) of this section should be revised to allow the described "opting out" also by any REP that served customers subject to the customer protection rules because it was picked by lottery to be the small non-residential POLR for the 2005 - 2006 term, when the small non-residential class was 0-1000kW and the opting out clauses were not in effect.

Commission response

The commission agrees with TSCC that a REP should not lose the ability to opt-out if it has only served customers subject to the customer protection rules as a result of being picked by lottery to serve as the small non-residential POLR for the 2005 - 2006 term. However, the commission does not want to discourage a REP that now has the ability to serve customers under the customer protection rules from doing so if it so desires.

In regard to (h)(3), RMC recommended that the commission announce REPs eligible to serve as POLR no later than four months prior to the date when a new POLR term begins and that a REP must receive some notice regarding when and where the eligibility list will be available. RMC commented that a REP must have the ability to ascertain if an error has occurred in the eligibility determination and to submit documentation demonstrating the error. TSCC replied that while the time frame recommended by RMC differs from that suggested by TSCC, the important point is to allow REPs sufficient time to begin planning to serve if selected and, if necessary to allow enough time for a REP to challenge such a designation. TSCC also replied that it agrees with RMC's request to have the authority to rely on the original data provided to Staff to contest a designation, rather than additional information, as the rule should allow a REP to put forward any information that would demonstrate that it does or does not qualify to serve as a POLR.

Commission response

Consistent with previous discussion, the commission declines to change the timeframes contained within the rule as they provide adequate time to prepare for POLR service. The commission agrees with RMC and TSCC that a REP should be allowed to contest eligibility by relying upon the originally supplied data. The commission does not want, however, the challenge process to simply turn into a process where any REP unhappy with its eligibility determination simply makes the commission staff reexamine the eligibility without providing any new rationale or specifically illustrating why the REP believes the initial determination is wrong. Therefore, the commission has modified the rule language to clarify that any relevant information may be used to challenge an eligibility determination, but in any such challenge, the REP will bear the burden of proof and must specifically pro-

vide the data, the calculations, and a written explanation, that clearly illustrates and proves the REPs assertion.

RMC recommended that subsection (h)(4) of this section be deleted as it does not see a need for biannual reports. Subsection (o) of this section addresses the termination of POLR status. RMC recommended that a new subsection be added that requires the commission to establish a standard form that REPs must use to report their eligibility information.

Commission response

The commission declines to adopt the recommendation of RMC. The biannual reports are required so that the commission can determine that a REP that was initially eligible to serve as a POLR provider, remains in a position of qualification. The biannual report requirement is meant to help reduce the possibility of a POLR transition causing another REP to default. The commission agrees with RMC that a standard form for REPs to report their eligibility information would be useful but declines to adopt any such form at this time. As experience is gained through the selection process for the 2007 - 2008 POLR term, the commission Staff may develop a standard form that REPs may use to submit their eligibility information.

§25.43(i) - Volunteer POLR REP list

ERCOT recommended it be allowed to establish the maximum number of ESI IDs that a volunteer POLR REP may accept in a mass transition event, exclusive of their load value. TSCC stated in reply comments that the commission should not adopt ERCOT's recommendation because it would amount to ERCOT establishing the customer load that a volunteer POLR REP may accept. To accommodate concerns about a REP designating too great or too small a load, the commission could institute some sort of challenge procedure in which ERCOT could challenge a volunteer POLR REP's load designation before the commission. This should be only an abbreviated procedure, resolved within a very short time based on objective evidence by which ERCOT would show that the REP's designation should not be upheld.

Commission response

The commission agrees with TSCC that ERCOT should not be responsible for determining the amount of load that a volunteer POLR REP may accept as restricting a POLR REP will most likely result in a contested proceeding that is appropriately the responsibility of the commission. However, the commission notes that consistent with the discussions in other commission responses, volunteer POLR REPs shall designate the number of ESI IDs, not load, that they are willing to accept, and ERCOT shall make the assignments exclusive of their load value. The key difference is that the volunteer POLR REP shall designate the number of ESI IDs and not ERCOT. The commission agrees with the concept of ERCOT challenging a volunteer POLR REP's designation if ERCOT feels it is appropriate to do so. This challenge process would effectively accomplish the same goal, but would keep the challenge process with the commission. The commission believes that this process could be a valuable tool to decrease the likelihood that a transition of customers would cause a volunteer POLR REP to default. The commission has modified the rule language accordingly. The commission envisions that if ERCOT has specific reason to doubt the ability of a volunteer POLR REP to serve additional customers in accordance with the rule, or if ERCOT believes the volunteer POLR REP no longer meets the eligibility requirements, ERCOT shall make a confidential filing with the commission that describes the particular concerns. If the commission staff is in agreement with ERCOT, the volunteer POLR REP shall be given the opportunity to withdraw from volunteer POLR REP status. If the volunteer POLR REP declines to withdraw, the issue shall be brought before the commission for determination of the REP's continued eligibility to serve as a volunteer POLR REP.

RMC commented that it is unclear if the notification to the commission pursuant to proposed subsection (i) of this section, to indicate a willingness to serve as a volunteer POLR REP should be submitted as part of or separately from the eligibility information required by proposed subsection (h)(1) of this section, which states that REPs should indicate any interest in providing POLR service as a volunteer POLR REP by July 10 of each even numbered year. RMC recommended that the rule should be clarified so that proposed subsection (i) of this section specifies all of the information relating specifically to a REP's willingness to serve as a volunteer POLR REP, while proposed subsection (h)(1) of this section is limited to specify only the information that all REPs must file for purposes of determining eligibility. RMC recommended that each volunteer POLR REP be required to submit, by customer class and POLR area, the number of additional ESI IDs it is willing to take as a volunteer POLR REP each time there is a mass customer transition. In the event of a mass customer transition, the affected ESI IDs, up to the total number of ESI IDs that all volunteer POLR REPs specified, should be randomly allocated to all volunteer POLR REPs based on the percentage of ESI IDs each volunteer POLR REP specified in its submission to the commission. ERCOT replied that it agrees with RMC's suggested language that substitutes the number of ESI IDs for load or consumption.

OTTA commented that the "volunteer" and "non-volunteer" approach will make it impossible for any one POLR provider to serve a sufficient number of customers to assure stable and affordable prices and will contribute to the high cost of essential electric service for Texans. OTTA commented that a volunteer REP acting as POLR can offer a different rate for POLR customers, but that it is not required to be offered to all POLR customers so that the POLR is likely to make this offer only for those customers that it considers "desirable."

Commission response

The commission agrees with RMC that there needs to be clarity between subsections (i) and (h)(1). The commission has modified the rule language to clarify its intent that all REPs must supply the information to determine eligibility for voluntary and non-volunteering POLR service, and separately, a REP must indicate its willingness to serve on a volunteer POLR REP basis. The commission agrees with RMC that in a mass transition, ESI IDs will be transitioned to the POLR providers and not the generic designation of "customers." The commission agrees with OTTA that the offer of a non-POLR price to a POLR customer should be on a non-discriminatory basis. In a mass transition event, customers are transitioned rapidly and through no fault of their own. Customers are also captive to the POLR provider for some period of time. It would be inappropriate to treat customers in a discriminatory fashion by making available competitive products to some customers and restricting others to only the POLR rate. To eliminate this problem, the solution is to make the same competitive products and services available to POLR customers as would be available to similarly-situated non-POLR customers. The rule language has been modified accordingly to reflect this concept.

ERCOT commented that the proposed provisions in subsection (i)(1) of this section could lead to unpredictability and uncertainty

during mass transitions and could potentially place ERCOT in an untenable position of having to assign customers to POLR REPs without clear rules governing the process. ERCOT indicated that it is extremely reluctant to take on the responsibility of assigning customers to POLR REPs under the proposed method given the potential for large numbers of volunteer POLR REPs in various customer class segments and TDU service areas, with varying limits on their willingness to accept mass transition customers. ERCOT recommended that subsection (i)(1) of this section be modified to require volunteer POLR REPs to note any limitations on their willingness to serve (such as whether their capability to serve is for one transition event or for a given period of time). ERCOT also questioned whether volunteer POLR REPs who did not receive their identified limit of POLR customers in one transition should be given priority in a subsequent transition. ERCOT suggested that to avoid extensive modifications that would be necessary to limit the assignment of ESI IDs to POLRs, ERCOT should be allowed to assign customers to the volunteer POLR REPs by identifying a maximum number of ESI IDs of each customer class exclusive of their load value. ERCOT suggested that ESI IDs should be sorted by TDU service area, then sorted by customer class, then assigned a random number and sort the ESI IDs numerically based on the random number, then sort the volunteer POLR REPs according to a methodology approved by the commission, and finally assign the ESI IDs to volunteer POLR REPs in numerical order at the quantity agreed to starting with the first volunteer POLR REP identified in the commission-prescribed methodology. RMC stated in reply comments that contrary to ERCOT, it believes that permitting volunteer POLR REPs to designate any limitations on their willingness to serve POLR customers in less objective, precise, and straightforward terms than the number of ESI IDs per mass transition could pose administrative problems for ERCOT ensuring that the designated limitations are honored.

TSCC suggested that the "no later than" date for REPs to submit an indication of their willingness to serve as a POLR on a volunteer basis be moved to July 15, two weeks after TSCC's proposed date for publication of the eligible REP list. TSCC also commented that the phrase "At the time it requests volunteer POLR REP status," be added to the beginning of subsection (i)(1) of this section. RMC replied that it does not advocate a change in the timeframe, as recommended by TSCC.

Commission response

The commission agrees with ERCOT that there is ambiguity in the rule and has therefore modified the language to address the concerns of ERCOT and clarify the commission's intent with regard to assigning ESI IDs to POLR REPs. It is the commission's intent that when a volunteer POLR REP designates the number of ESI IDs that it can serve on a volunteer basis, that the number applies to each transition occurrence. If the customers received by a volunteer POLR REP in one transition changes the volunteer POLR REPs ability to serve POLR customers in a subsequent transition, then the volunteer POLR REP has the responsibility to change its designation. Each transition event is to be independent of another transition event, meaning that no preference is given to a volunteer POLR REP in a subsequent transition, if it did not receive the full amount of ESI IDs it had volunteered for in a previous transition. The commission agrees with the ESI ID assignment methodology outlined by ERCOT and has modified the rule language to reflect the described process. In addition, the last step of assigning the ESI IDs to volunteer POLR REPs shall be done in the non-discriminatory percentage of total volunteer ESI IDs method previously described by RMC and discussed in the response to preamble question number 8.

OTTA commented that the proposed rule needs to clarify how disclosures to customers need to be made when marketing alternative products.

Commission response

The commission notes that subsection (i)(3) has been modified to remain consistent with the discussions contained in other commission responses. The commission agrees with OTTA that the rule language needs to clarify how disclosures to POLR customers are to be made when marketing alternative products to remove any ambiguity. It is the commission's intent that volunteer POLR REPs initiate their normal enrollment marketing procedures with transitioned customers to make the customers aware of and to switch them to non-POLR rate products.

OTTA commented that the provision in subsection (i)(4) that states that the smallest POLR providers get the first assignments is likely to reward those REPs who are the least successful in the competitive market and who may not have the necessary billing and customer support infrastructure to handle a sudden influx of customers. It is likely that the smallest REPs will not have the resources or size to offer more attractive offers to residential customers and will rely on the high priced POLR service to stay in business.

ERCOT commented in reply comments that the use of ESI IDs rather than load for the purposes of allocating to POLRs is appropriate. ERCOT stated that its current method for aggregating consumption data does not provide for continuous banking of consumption data at the ESI ID level. For ERCOT to be able to obtain this data, it would have to make extensive modifications to its system processes, which would have a tremendous impact on system performance and data storage needs.

Commission response

The commission notes that the concern of OTTA is now moot as the commission has modified the assignment methodology, consistent with the discussions in previous commission responses. The commission also agrees with ERCOT that, consistent with previous discussion, an allocation methodology based upon ESI IDs is appropriate. The commission again notes that volunteer POLR REPs must factor the potential variation in load that different ESI IDs may represent into the decision on how many ESI IDs the REP volunteers to serve in a transition event.

ERCOT commented that if a volunteer POLR REP requests removal from the volunteer POLR REP list, then the volunteer POLR REP must continue to make its POLR service available to ESI IDs previously acquired through a mass transition event as well as any ESI IDs the volunteer POLR REP may acquire from a mass transition event during the 30-day notice period. ERCOT also stated that the reference to estimated amount of load in subsection (i)(5) of this section should be revised to reflect the number of ESI IDs by customer class in a TDU service territory.

RMC replied that it should be clarified that if a volunteer POLR REP requests to be removed from the list or to modify its requested number of ESI IDs pursuant to proposed subsection (i)(5) of this section, such a change would be prospective only, the volunteer POLR REP would not be permitted to simply walk away from its responsibility to continue to serve POLR customers that have already been allocated to it.

OTTA recommended that a volunteer POLR REP not be allowed to become a POLR for several years after it un-volunteers.

Commission response

The commission agrees with the interpretation of RMC which addresses the concerns of ERCOT. If a volunteer POLR REP changes its volunteer status, such a change is on a prospective basis. The REP is not allowed to abandon customers that had previously been transitioned to it. The commission agrees with ERCOT that the reference to "load" should be changed to "ESI IDs" consistent with previous commission responses. The commission disagrees with OTTA that a volunteer POLR REP should be disqualified for several years if it un-volunteers. While the commission does not want volunteer POLR REPs "bouncing" back and forth and hopes that such movement would be kept to a minimum, the intent of the volunteer system is to encourage REPs to volunteer for an amount that they can adequately serve. If that amount changes, the commission does not desire to have a volunteer POLR REP "locked in" to a commitment that can no longer be honored. After time, if the REP is again in a position to volunteer, the commission sees no reason to exclude the REP from POLR eligibility simply because it determined that it was in its best interest to not potentially assume transitioned customers at some point in the past.

§25.43(j) - Non-volunteering POLR Providers

RMC recommended that if a volunteer POLR REP follows the enrollment processes in §25.474, when a customer affirmatively chooses a competitive product, then it is clear that the customer chose the competitive product and the limit in subsection (j)(3) that the marketed rates must be lower than the POLR rate is unnecessary.

RMC commented that an alternative approach for allocating the non-volunteering POLR obligations is to allocate the responsibility by market share to all REPs that are determined eligible to be a non-volunteering POLR provider using the 3% eligibility standard in proposed subsection (h)(2)(C) of this section. The transfer of ESI IDs to non-volunteering POLR providers should be similar to the process recommended for transfer of ESI IDs to volunteer POLR REPs in proposed subsection (i) of this section. TSCC replied that it disagrees with RMC's suggestion that all REPS who meet the eligibility criteria should become POLRs. TSCC stated in reply comments that selecting the five largest providers in that customer class ensures that only REPs who presently possess adequate resources and experience in serving that customer class will serve as POLRs. Using the five largest providers minimizes the ramp-up expenses REPs would incur as a non-volunteer POLR provider, and also assures customers that the POLR will possess experience and acumen in serving that customer class.

Commission response

The commission agrees with RMC that if a customer affirmatively chooses a competitive product or service then the commission should not be concerned with how the competitive product compares to the POLR price. To clarify the commission's intent, a transitioned customer should go through the POLR's normal marketing procedures as a REP, to move the transitioned customer to an alternative product. Any arbitrary rate offering that transitioned customers are automatically placed under without the customer being marketed to and without the customer making an affirmative choice, shall not be at a rate higher than the POLR rate. The commission agrees with TSCC that it is inappropriate and overly burdensome to make all REPs that meet the eligibility requirements non-volunteering POLR providers. By increasing the number of non-volunteering POLR providers to five from the one authorized in the previous structure, as well as the existence of the volunteer POLR REP structure, the risk associated with being a non-volunteering POLR provider has been greatly reduced and there is not a need for every eligible REP to serve as a non-volunteering POLR provider.

ERCOT cautioned that any form of reallocation process will greatly complicate this rulemaking and the changes ERCOT will have to make to its systems and processes. If the commission decides to include such a reallocation process as proposed by RMC where a non-volunteering POLR provider may request that ERCOT reallocate ESI IDs if a non-volunteering POLR provider is assigned load equating to more than a 10% positive variance from its load ratio share, the process and standards to be applied need to be clearly stated.

Commission response

The commission agrees with ERCOT that a reallocation process will greatly complicate the rule and believes that such a process is unwarranted in light of the existence of five non-volunteering POLR providers and the added provision that addresses financial integrity. Therefore, the commission declines to adopt the reallocation process as proposed by RMC.

First Choice and RMC commented that the POLR Electricity Facts Label (EFL) update process should require the largest non-volunteering POLR provider for the residential customer class and the largest non-volunteering POLR provider for each of the small non-residential customer classes in a POLR service territory to each calculate an EFL at the time the POLR price is determined. The POLR responsible for the calculation would then provide the commission with electronic copies of the EFLs to post on the commission's website.

Commission response

The commission agrees with First Choice and RMC that the POLR EFL should be completed by the largest (or first) of the non-volunteering POLR providers in each service territory for each customer class as there is no need for multiple POLR EFLs that would state the same rate. The POLR responsible for the calculation shall provide the commission with electronic copies of the EFLs for placement on the commission's website.

TSCC stated that if the commission desires that each POLR area have five non-volunteering POLR providers, TSCC recommends that the phrase "other than the volunteering REPs" be inserted after "five eligible REPs" in the third sentence of subsection (j)(1) of this section. TSCC also commented that the date for designating the non-volunteering POLR providers should be moved up to September 1, instead of sometime in October. RMC replied the revisions proposed by TSCC might suggest that the identities of the five non-volunteering POLR providers for a specific customer class in a TDSP service area must be different from the identities of the POLR providers that volunteer to serve that same class in the area, and thus opposes the suggested modification of TSCC.

Commission response

The commission declines to make the exact recommended changes of TSCC because the recommended language is inconsistent with the rule as the non-volunteering POLR providers may also serve as volunteer POLR REPs, but the commission has modified the rule language throughout the rule to clarify its intent where it is appropriate to do so. Consistent with other commission responses, the commission declines to change the

date as recommended by TSCC but has made the "October" reference specific to October 15. The commission believes that the dates and time frames included in the rule are appropriate.

RMC commented that proposed subsection (j)(2) of this section should specify October 1, as the date by which non-volunteering POLR providers shall be announced. RMC commented that it agreed that the allocation of ESI IDs to non-volunteering POLR providers should be reduced by the number of any ESI IDs served by the POLR REP on a volunteer basis. RMC further recommended that non-volunteering POLR providers should be able to offer competitive products and services to the customers transferred to POLR and those customers have the right to choose such competitive products. TSCC commented that the date for non-volunteering POLR providers to be announced should be moved to September 1.

OTTA stated that the methodology by which the non-volunteering POLR providers are selected is not set forth in the proposed rule.

Commission response

The commission declines to change the date specified in the rule as the commission believes that the time frames and dates are appropriate. The commission disagrees with RMC that the allocation to non-volunteering POLR providers should be reduced by any amount the POLR provides service to on a voluntary basis. The commission has discovered an error in the process in that the calculation would leave transitioned customers unaccounted for if all five non-volunteering POLR providers were also volunteer POLR REPs. Therefore the "credit for voluntary service" language has been removed due to the necessity of properly accounting for all ESI IDs that must be transitioned. The commission agrees with RMC that non-volunteering POLR providers should be allowed to market non-POLR products to transitioned customers. It is the commission's intent that the marketing be handled in the same fashion as is applicable to volunteer POLR REPs. The commission disagrees with OTTA that the rule language does not state the methodology by which non-volunteering POLR providers are selected, but the rule language has been modified to clarify intent and eliminate ambiguity throughout.

TSCC commented that the allocation process and how market share will be calculated needs to be clarified. TSCC suggested that market share be calculated based on the number of customers and that to avoid future confusion, the sequencing should be clarified in this subsection (j)(2) of this section. RMC replied that it opposes the revision proposed by TSCC and suggested that if the approach in proposed subsection (j)(2) of this section is retained, the subsection should be modified to clarify that market share based on "load" means the REPs' market share based on MWh.

Commission response

The commission agrees with RMC that the current language is ambiguous. The rule language has been modified to clarify that the reference to "load" refers to a REP's market share based upon MWh served.

RMC recommended a new subsection (j)(5) of this section, that would permit a non-volunteering POLR provider to request the commission to relieve it of any additional allocation of POLR customers, based on a showing that it will be unable to maintain its financial integrity if it is required to serve any additional POLR customers.

Commission response

The commission sincerely hopes that this situation never arises as this is the exact event that the change from one POLR provider to multiple volunteer POLR REPs and five non-volunteering POLR providers is meant to prevent. However, the commission agrees that if an additional allocation of POLR ESI IDs will threaten the financial integrity of a non-volunteering POLR provider, the POLR provider should be relieved of future non-volunteering POLR provider responsibility and with 90 days notice, the next eligible REP (determined in the same fashion as the original five) shall assume the non-volunteering POLR provider responsibility.

§25.43(k) - POLR rate

OTTA commented that POLR service for residential customers should be priced based on the average price of a portfolio of electricity supply contracts and services that is designed to assure affordable and stable prices for essential electricity service. OTTA stated that the intermingling of the duties of the POLR with most of the larger REPs in the retail market will be confusing to customers and will contribute to the inability to comply with the statutory vision for POLR service that the commission appears to have ignored in these proposed rule changes. Cities replied that it agreed with OTTA that it would be unwise to base POLR pricing on the MCPE when such prices can become extremely volatile. The proposed reliance on MCPE pricing could have disastrous consequences for customers who are not informed of the potential high risk and volatility associated with such pricing.

COH commented that the POLR rate formula is too fluid because it is tied to MCPE and there does not appear to be any competitive bidding process to determine the adders or percentages in the rate formula. COH urged the commission to reconsider its current formula for calculating the POLR rate, and make the POLR the safe harbor anticipated by the Legislature.

TTP commented that the affordable rate package it proposes would be determined with a formula that starts with the residential price to beat in effect on January 1, 2002, adjusted for national price increases using a U.S. Department of Energy price index and then provide a twenty percent rate discount.

Commission response

The commission disagrees with OTTA that the POLR price should be based upon a portfolio of supply contracts as the recommendation is inconsistent with the general structure of the POLR rule. The commission also disagrees with OTTA that the POLR rule does not comply with the "statutory vision" of POLR service. The commission disagrees with Cities that the volatility of the MCPE formula is problematic. The commission has determined that the POLR price must accurately reflect the cost and risk associated with providing POLR service. The commission declines to reconsider the POLR rate formula as recommended by COH and disagrees that the POLR rate should be based upon a competitive bid process, as experience with a bid process is one of the factors that led to the need for the current rule amendments. The commission disagrees with TTP that the starting point for the POLR rate formula for the residential and small non-residential customer classes should be the price to beat rates, and disagrees that the rate should then be adjusted in a fashion that is not consistent in any way with the costs associated with providing POLR service.

Cities commented that the rate formula under subsection (k)(1) should be simplified to facilitate comparisons of POLR offers and to provide greater transparency to POLR customers by eliminating customer and demand charge components of the rate. Addi-

tionally, Cities commented that the rate formula should be modified to specify that both TDSP charges and credits will be passed through under the POLR rate to ensure that small customers receive the benefits of any credits resulting from the true-up proceedings. RMC stated in reply comments that it opposed Cities proposal to incorporate the customer and demand charges in the overall MCPE-based charge to simplify the POLR rate structure. RMC also replied that Cities proposed modification to specify that TDSP credits will be passed through under the POLR rate is unnecessary.

OTTA commented that such a pricing plan will make it impossible for most residential consumers to compare alternative pricing mechanisms or alternative providers. OTTA commented on the uncertainty of how a POLR will calculate a deposit amount based upon the proposed formula.

RMC commented that it generally supports the MCPE-based rate structure set forth in the proposed amendments and stated that POLR service should be provided using a market-based rate that reflects the short-term market price for power, the non-bypassable charges, and the risk associated with providing service to the unpredictable POLR load. RMC commented that it supports retaining the current method of calculating POLR rates for large non-residential customers because the formula relies on a shaped ERCOT load profile. RMC commented that because IDR-metered customers have actual meter usage available, it would be inappropriate to apply a 30-day average load profile-based formula to these customers. RMC therefore recommended that the same formula as proposed for the large non-residential customers should be used for small non-residential customers with IDR meters. RMC commented that $2,897 is a reasonable customer charge for customers with an IDR meter. RMC commented that for the residential and small non-residential customer classes, the pricing formula should be revised to reflect a twice-monthly update because more frequent updates to the MCPE would reduce the necessary risk premium for POLR service to these classes. RMC stated that the reference to demand charges should be deleted from the residential pricing formula as no demand charge will be applicable. RMC recommended that the rules should clarify that neither customer charges nor demand charges should be pro-rated for partial months. RMC stated that the customer charge is intended to cover the administration associated with setting up, billing, and then closing an account, which is the same whether the customer is on the service for one month or one day. RMC also stated that demand charges are based on the highest demand in the time period for which service is rendered, and it is therefore inappropriate to pro-rate these charges for service that do not span a full month. RMC commented that the current terms of service for POLR indicates that demand charges should not be prorated and that the rule would benefit from greater clarity with a specific statement to that effect. RMC recommended that the MCPE floor of $7.25 per MWh for the large non-residential class that exists in the current rule be retained and also applied to the IDR-metered small non-residential customer class. For residential and small commercial customers without IDR meters, RMC recommended that the POLR be allowed to charge non-bypassable charges plus the customer or demand charges plus the higher of either 150% of MCPE or an energy price floor based on historical averages of POLR rates. The energy price floor for the residential class for the two-year period beginning January 1, 2007, should be derived by taking a simple average of historical non-volunteering POLR provider rates at 1000 kWh per month usage (less non-bypassable charges and its proposed POLR customer charges) for the 12 months ending March 31, 2006. This calculation should be performed for each TDSP service area to develop an energy floor specific to each service area. The energy price floor for the small non-residential class without IDR meters is derived in the same manner. For subsequent two-year POLR cycles, the floor should be updated for each TDSP territory and customer class using a simple average of 150% of MCPE for the 12-months ending March 31 of even numbered years. RMC also recommended that the commission allow a non-volunteering POLR provider to request an increase to the energy price floor if the current floor yields a POLR rate that is less than the competitive electricity price offered to a majority of customers in a particular class in a particular TDSP service area. RMC commented that the rules should clarify that not only are TDSP charges added to develop a complete POLR rate but also applicable taxes and other non-bypassable charges. These charges are specified as part of the price in the existing POLR terms of service, but have been deleted from the proposed POLR terms of service. RMC commented that more clarity is needed around the ERCOT process for calculating the MCPE and posting the data. ERCOT should be explicitly directed when and where to post the information publicly. RMC proposed that these calculations be posted on ERCOT's website on the 15th and the last day of every month, using data from the 30 days immediately prior to the posting. The commission should also clarify that the load profile to be used for calculating the POLR rate is a backcasted load profile, rather than a forecasted profile. RMC recommended that rather than using all possible load profile/weather zone/congestion zone combinations for each TDSP territory, each rate should use the predominant weather zone, load profile type, and congestion zone. RMC stated that given the number of POLRs that will be serving under the proposed rule, RMC recommended that the commission memorialize its monthly process to administer the POLR rate calculations by including the process in the rule.

ERCOT suggested that the commission review the calculation for the small non-residential customer class POLR rates to ensure that a qualifier for interval load reflects the intent of this rule. The language in subsection (k)(1)(B) of this section should also be modified to be consistent with ERCOT's suggested definition for medium non-residential customer class in subsection (c) of this section. In reply comments, ERCOT stated that it encourages the commission to reject the request of RMC that ERCOT be directed to post backcasted shaped MCPE data on ERCOT's programmatic interface on the 15th and last day of each month. ERCOT also questioned whether the designations of profiles and zones to be used should be made by rule. For example, RMC's recommendation uses 2006 zones, which could potentially change in subsequent years.

TSCC stated in reply comments that it supports the general concept of a price or MCPE floor. TSCC recommended using a defined price, rather than a formula. TSCC also reiterated their reply to OPC's recommendation of using a fixed MCPE adder rather than a multiplier. TSCC stated that the commission should use the multiplier to account for unknown and unforeseeable costs and to minimize customer charges at low MCPE levels.

RMC stated in reply comments that the costs incurred to serve electric customers include ERCOT Administration Fee, Unaccounted for Energy, Local Balancing Energy, Out of Merit Energy, Out of Merit Capacity, Black Start, Reliability Must Run, Regulation Service-Up, Regulation Service-Down, Responsive Reserve Service, Non-Spinning Reserve Service, Replacement

Reserve Service, Voltage Support, QSE costs, losses, and bad-debt expense, and therefore stated that OTTA has not considered the full extent of costs incurred to serve electric customers in its comments and recommendations.

Commission response

Consistent with previous discussions in other commission responses, the commission has determined that the POLR rate should reflect a flow through of the applicable non-bypassable charges, a flow through of ERCOT charges, a POLR customer and demand charge, and an energy charge that is 130% of the MCPE, with a price floor. The commission disagrees with OTTA that the MCPE based formula would be indecipherable for unsophisticated customers and the commission disagrees with Cities that a revised formula will simplify comparisons of alternate rates and increase transparency. The commission also declines to eliminate customer and demand charges as they are necessary components used to recover the costs associated with providing POLR service. The commission agrees that all non-bypassable charges, meaning both charges and credits, should be passed through to POLR customers, as well as any other applicable taxes. The commission agrees with RMC that customer charges and demand charges should not be pro-rated when a customer leaves the POLR and has modified the rule language accordingly.

§25.43(l) - Prohibition on serving as POLR (Challenges to ESI ID assignments)

RMC commented that the rule does not address which entity is responsible for service to customers during a POLR's challenge. If the POLR REP does not succeed in its challenge, it should be responsible for the service because it should have been providing service during the period it made the challenge. If the POLR REP prevails and is found not to be correctly designated as the POLR for that customer, RMC believes the market should be responsible for the service and any costs associated with providing service for the dispute period should be allocated to retail market participants. ERCOT and TDUs disagreed that when a POLR successfully challenges a customer assignment by ERCOT, then the cost to serve the customer should be uplifted to all market participants in an equitable and non-discriminatory manner. ERCOT stated that it believes that uplift in such circumstances would not be necessary and that costs can be assigned to the proper POLR after the proper assignment is made and that all subsequent settlements for those operating days will correctly reflect changes to the proper POLR. TDUs added that the POLR has an obligation to serve customers assigned to it, unless and until the customer's classification is changed, and any change in the customer's classification should operate prospectively, not retroactively.

ERCOT commented that since the TDU is responsible for assigning the customer class, ERCOT recommends that if the POLR REP wishes to challenge the customer class of an ESI ID, the POLR REP should utilize the appropriate market resolution tool to work with the TDU. In the event a POLR challenges a customer assignment and the TDU determines that the appropriate POLR is not the POLR of Record, ERCOT proposes that back-dated transactions may be used to assign the ESI ID to the correct POLR. The TDU would then also be required to forward updated initial and final meter readings to the appropriate POLRs through ERCOT in order to synchronize market systems. TDUs replied that they do agree with ERCOT that challenges to customer class assignment should be resolved using existing market resolution tools or those being developed by the market.

TSCC commented that it strongly agrees with this provision but that it needs to be clarified and deadlines added. TSCC also stated that the title of this subsection is misleading and should be changed as the subsection does not address prohibitions on serving as a POLR, but rather that a POLR is not obligated to serve customers in classes for which it has not been designated to provide service. TSCC commented that the subsection should include strict deadlines to minimize the period of time a customer may be served by the wrong POLR at the wrong rates and terms of service and a POLR is at risk of having to provide service to a customer it is not prepared to serve. TSCC recommended that a POLR notify ERCOT within 2 working days of receiving information indicating that a customer who is proposed to be transferred to the POLR may belong to a class or reside in a TDU service area which the POLR is not designated to serve. Within 24 hours of such notification, ERCOT must request the TDU in the applicable POLR area to make the necessary determination of the appropriate customer class and TDU service area, and the TDU must provide this determination to ERCOT and the POLR REP no later than 24 hours after the ERCOT notification. The rule should provide that the POLR REP shall initiate a switch request to the appropriate POLR upon being provided information by the TDU confirming the appropriate customer class and TDU service area. ERCOT replied that the timeframes proposed by TSCC are inappropriate and unnecessary as there is already a defined process for resolving retail data issues, with the TDU data as the source of the resolution, and therefore the resolution should be between the POLR and the TDU.

TDUs commented that ERCOT should be in charge of making assignments of customers to POLRs, as is the case now. If the TDU is asked to resolve a dispute, it will merely reflect what is in the TDU systems, information that will have been provided to ERCOT. TDUs commented that any dispute about a customer's assignment should not delay the implementation of the switch to the POLR, and the limitation on the POLR's obligation to serve contained in the first sentence of this subsection should not be read as providing otherwise. ERCOT disagreed with the TDUs in that pursuant to the ERCOT Protocols, the TDU is responsible for assigning customer class. Therefore, if a POLR disputes the classification, that dispute is between the POLR and the TDU, not between the POLR and ERCOT. Any such dispute can be resolved using the market's existing retail data dispute resolution processes. In reply comments, TDUs commented that they disagree with ERCOT that the TDUs should be responsible for assignment of customers to POLR classes, and for resolution of disputes regarding assignment. Currently, ERCOT assigns customers to POLRs based on the customer's "Premise Type" which is reported to ERCOT by the TDU. However, the "Premise Type" is not equivalent to customer class and may not be up-to-date. Instead, customers should be assigned based on actual historic usage data, which ERCOT already has in its system. If ERCOT were to calculate and assign customers based on this historic usage data, assignments would be more accurate than if done by "Premise Type" and there would be fewer disputes. ERCOT is also in a better position than the TDU to settle any disputes about customer assignment that arise, based on the same historic information in its system.

TSCC stated in reply comments that the disagreement between TDUs and ERCOT is exactly why the rule needs to specify a mechanism that will ensure that a customer is served by the appropriate POLR, and will specify exactly which entity bears

responsibility for actions necessary to ensure that takes place. TSCC recommended imposing this responsibility on the TDU, as the TDU will have the most up-to-date and complete information, and putting this responsibility on the TDU will reduce the burdens on ERCOT. A transfer to POLR is just one form of customer switch and typically the TDU will provide the requisite customer information in a customer switch, so this provision merely requires the TDU to verify its own information in the event a customer is directed to the wrong POLR. TSCC stated in reply comments that backdating POLR service dates as suggested by ERCOT is not an appropriate resolution, particularly in the larger customer classes. If a customer is retroactively assigned to a POLR, then that POLR will not have had any opportunity to secure a deposit or obtain other credit security in advance of that customer being transferred to the POLR. If a customer is retroactively assigned to a POLR, and then the customer defaults, that POLR bears the financial consequences of the default. Those consequences can be severe in the large classes. Further, if the commission does not firmly establish which entity bears the responsibility to clarify which customer belongs with which POLR, the resolution process could take a long time.

Commission response

The commission disagrees with RMC that the costs associated with serving a customer whose POLR designation has been successfully challenged should be uplifted to the market. The commission agrees with ERCOT that uplift would not be necessary and that costs can be assigned to the proper POLR after the proper assignment is made and that all subsequent settlements for those operating days will correctly reflect charges to the proper POLR. Any settlement charges to the incorrect POLR prior to this change in POLR assignment would be corrected with subsequent settlements. This methodology is similar to and consistent with ERCOT's current market dispute resolution process involving an inadvertent switch, using the FasTrak system. The commission also agrees with the rationale stated by TDUs, that the POLR has an obligation to serve customers assigned to it, unless and until the customer's classification is changed. Therefore, the responsibility to serve a POLR customer shall be the POLR REP that the ESI ID is initially assigned to. In the event the assignment is challenged, the ESI ID shall remain the responsibility of the assigned POLR until a determination is made that changes the assignment. A challenge shall be conducted and resolved using existing market resolution tools as recommended by ERCOT and the TDUs. The commission agrees with ERCOT that the timeframes proposed by TSCC are inappropriate and unnecessary as the commission has determined that the existing market resolution tools should be used for resolving retail data issues. The commission agrees with ERCOT that the applicable TDU should be responsible for making the determination in a POLR assignment dispute. The TDU shall make the determination based upon historic usage data and not premise type. The commission agrees that ERCOT may have the same data in its system, but the commission determines that the TDU is the appropriate entity to review the historic usage data and make the determination as to which customer class the ESI ID belongs in.

§25.43(m) - Limitation on liability

Cities commented that §25.43(m) should be modified to ensure that POLR providers have some legal obligation to provide the offered POLR service and also stated that there is no justification for the proposed amendment to the POLR rule to reduce the liability of the POLR supplier for defaults under such service agreements.

RMC commented that the limits on liability need to be clarified in circumstances that do not involve intentional misconduct or gross negligence. Without this change, it would be unclear whether the POLR could be held responsible for the negligence of another entity involved in the POLR process for actual damages. RMC stated in reply comments that the current Terms of Service clearly place liability for direct actual damages on the POLR. RMC further stated in reply comments that the proposed language would make the POLR liable for consequential, exemplary, special, incidental, or punitive damages in cases of gross negligence or intentional misconduct, but the proposed language fails to clearly and specifically limit liability to direct, actual damages for all occasions other than gross negligence or intentional misconduct, which creates an ambiguity associated with liability when gross negligence or intentional misconduct is not involved, that should be clarified. RMC stated that the rule would be clearer if the specific limitation to direct, actual damages included in the current POLR Terms of Service remained, avoiding any ambiguity associated with cases of negligence that don't amount to gross negligence or intentional misconduct. RMC also proposed that the rule should also clarify that the POLR is only responsible for its own gross negligence or intentional misconduct related to its provision of or its preparation to provide POLR service, and that the POLR's liability for its own negligence is limited to direct, actual damages, if gross negligence is not involved.

TSCC commented that the POLR rule should include a limitation on liability for direct damages for the POLRs, and the limitation of liability clause should state that a POLR is not liable for damages to any REP whose customers are transferred to the POLR in compliance with the commission's rules. TSCC stated in reply comments that the commission should reject OPC's suggestion to delete this provision, as well as the Cities suggestion that it should not limit damages in the event the POLR fails to provide service.

OTTA commented that the proposed broad exemption from liability does not appear warranted in light of the statutory basis for the POLR obligation and the regulated nature of this service.

Commission response

The commission agrees with RMC that the rule would be more clear if the specific limitation to direct, actual damages included in the previous POLR Terms of Service was retained. The commission has modified the rule language concerning the limitation on liability to clarify the intent of the commission to reflect the level of liability consistent with the previous POLR Terms of Service in the body of the rule language itself. The commission agrees with the comments of TSCC that POLR providers should not be liable for damages to any REP whose customers are transitioned in accordance with this rule and has added language accordingly. The commission believes that it is also appropriate to extend this limitation of liability to ERCOT and has modified the rule language accordingly.

§25.43(n) - Transition of customers to POLR service

TSCC suggested that this subsection be reformatted to include all the provisions relating to "one off" transitions in one paragraph, and all provisions relating specifically to mass transitions in another. RMC replied that it agreed with TSCC that the processes should be set out in detail to make sure that the rules are clear as to how the transition to POLR will occur.

RMC recommended that subsections (n)(1) and (4) - (6) of this section be revised to clarify that POLR responsibilities apply only during the time period that the POLR is the customer's REP of record.

RMC stated that one provision of the rules (§25.474(l)) that extends the processing time for a switch is the requirement that ERCOT notify customers of the pending switch and allow customers seven days after the receipt of the notice to cancel the requested switch. The process adds at least ten days to the switching process. The notice requirement applies even for out-of-cycle switches. In fact, it subjects out-of-cycle switch requests to a higher rejection rate than normal meter read switches. To accelerate the process for switching customers off of POLR and in order to make the out-of-cycle switch request process more reliable, the commission should consider eliminating the ERCOT postcard notification process currently codified in §25.474(l).

TIEC commented that §25.43 must have absolute clarity regarding how a customer gets transferred to the POLR, the notices that must be provided, and the process for obtaining a switch from the POLR.

Commission response

The commission agrees with TSCC that the rule should clearly address and differentiate the "one-off" instance as opposed to the mass transition situation, when applicable. However, the rule has been modified to reflect the intent of the commission that the "one-off" situation shall not be applicable as of January 1, 2007. Consistent with the discussion in previous commission responses, in the event of a challenge to POLR assignment, the assigned POLR shall serve the customer while the challenge is pending. If the challenge is successful, the responsibilities may be backdated to the transition date to reflect the correct POLR assignment, therefore, the commission agrees with RMC that POLR responsibilities apply only during the time that a POLR is ultimately determined to be the REP of record, but notes that the assigned POLR is responsible while a challenge is pending. This process is consistent with the current process The commission agrees with RMC that for the purposes of transitions to and from a POLR provider, the ERCOT postcard notification process codified in §25.474(l) is not required.

RMC requested that subsection (n)(2) of this section be deleted to be consistent with its position that POLR functions are for customers who request POLR service and customers affected by REP default only.

Commission response

Consistent with the discussion in other commission responses, the commission declines to make the requested deletion of subsection (n)(2) of this section, due to the existence of §25.482, but has modified the rule language as appropriate to reflect that the provisions of §25.482 shall not be applicable as of January 1, 2007.

RMC recommended that subsection (n)(3) of this section be deleted because the provision has never been used by the market in processing mass transitions. It also stated that the issues of meter reads are addressed in another portion of the rule. RMC stated that in every transition of customers from a defaulting REP to the POLR, a market transaction has been used and an actual meter read has been obtained, and thus there is no need for subsection (n)(3) of this section.

Commission response

The commission declines to delete subsection (n)(3) of this section. The fact that actual meter reads have been obtained in past transitions is immaterial. It is the intent of the commission, that in an effort to reduce the time frame associated with a mass transition, that TDUs supply meter reads within two days. With such a short time frame, meter read estimations may be part of the required process.

RMC commented that the rule needed to be clarified to establish that the timeline for return of the deposit begins only after the REP receives the final meter read. RMC stated that (n)(7) is inconsistent with subsection (o)(3)(E) of this section, which is basically unchanged from the existing rule and allows 20 days for return of a deposit by a REP transitioning customers to POLR. It is also inconsistent with §25.478(j) which requires that a deposit be returned "promptly" after the REP is no longer the REP of record.

Commission response

The commission agrees that the rule language needs to be consistent throughout and has modified the language accordingly. It is the intent of the commission that an exiting REP return any unused portion of a customer's deposit within seven calendar days of receiving the meter read data from the TDU. The rule language in subsection (o)(3)(E) has been modified to remain consistent with this intent. The commission does not believe that §25.478(j) is inconsistent with this intent as that language only makes reference to the return of deposits "promptly." It is the commission's intent that the seven calendar day requirement constitutes a "prompt refund."

TDUs, Cities, and Joint Commenters generally stated that in the event of a mass transition involving thousands or tens of thousands of customers, the benefit of having information available through a customer information repository would greatly outweigh the cost in time and resources of populating the database.

RMC commented that it supported striking proposed subsection (n)(8) of this section because of the benefits of receiving customer information from the proposed database are far outweighed by the cost to maintain such a repository. RMC commented that the largest mass transition has only been 12,269 ESI IDs and continuously updating the customer information database creates an overwhelming administrative burden for something that might never happen. ERCOT generally agreed. While TTP also generally agreed, it also recommended improved customer notification systems and coordination with the Low-income Discount Administrator for obtaining customer information that is not available because of an uncooperative REP. TDUs disagreed in reply comments that the information storage would result in a significant expense, stating that there is no need to create a separate, expensive database, because an existing ERCOT database (Siebel) can be modified to store the information necessary for the POLR to be able to identify and bill the customer, such as name, telephone number, billing "care of" name, and billing address. TDUs also commented in replies that if it is necessary to place an obligation on POLRs to treat customer proprietary information with care, the commission should create the obligation by rule, or impose it as part of the POLR sign up process.

TSCC suggested that a deadline be included for an ERCOT database of December 31, 2006. TSCC commented that subsection (n)(8) of this section should also specify the minimum customer information that should be included in the ERCOT

database. TSCC commented that the last sentence of subsection (n)(8) of this section does not specify whose responsibility it is to provide customer information to the POLR in the event of a mass transition. TSCC recommended that such responsibility lie with the transferring REP, unless the transferring REP is unable to provide such information or has already exited the market. In such situations, the TDUs in whose service area the customers are located should have this responsibility. TSCC also commented that five business days is too long to wait for critical customer information to be provided to the POLR and recommended that the deadline be shortened to no longer than two business days.

Commission response

The commission agrees that a customer database could be costly to initiate and maintain. However, the commission believes that there is value to having some form of data warehouse in the event an exiting REP does not provide appropriate customer information to the POLR providers. The commission agrees with TSCC that the rule would benefit from additional clarity in regard to providing customer information to POLR providers. The rule language has been modified accordingly to reflect the commission's intent that in a transition of customers to POLR providers, it is the responsibility of the exiting REP to provide customer data to the POLR providers. If the exiting REP does not provide the data, the appropriate TDU shall provide whatever data is in the TDU's possession, with the understanding that the data may be out-dated, incomplete, inaccurate, or simply may not exist. In the future, ERCOT shall be responsible for providing the appropriate data through some form of data warehouse, as discussed in later commission responses. The commission declines to change the timeframe as recommended by TSCC as the commission believes that the time frames contained in the rule are appropriate. The commission declines to adopt the recommendation of TTP to utilize the Low-income Discount Administrator as the commission believes that the rule language has been modified in a fashion that addresses the concerns over the customer information database. The commission agrees with TDUs that the rule should create the obligation on POLRs to treat customer proprietary information with care and has modified the rule language accordingly.

ERCOT commented that it currently maintains a database that continuously matches each ESI ID to its REP of record, but does not include each customer's billing information. The rule, as proposed, could be read to require ERCOT to substantially increase the amount of data maintained in this retail database, at significant expense. ERCOT stated that a more effective and efficient solution exists that would obviate the need for ERCOT or market participants to invest in redundant data storage, data processing and resulting data synchronization. ERCOT recommended the establishment of a single standard file format and a standard set of customer billing contact data elements that, in the event of mass transition event, the departing REP and the POLR would use to send and receive customer billing contact information. To assess both the REP's ability to rapidly populate and send such files and a POLR's ability to rapidly receive the data, ERCOT recommended that the rule require a periodic verification methodology to be administered by ERCOT or a qualified third party. ERCOT would report non-compliance issues to the commission. In addition, ERCOT requested that the commission rules clearly confirm all REPs' responsibilities for submitting timely, accurate and complete files in the event of mass transition. In reply comments, OPC stated that it supports Texas Rose and ERCOT's concern as to the costs of maintaining a duplicate consumer database. OPC stated that it supports ERCOT's alternative solution that is more effective and efficient.

Commission response

The commission agrees with the alternative recommendation of ERCOT. The commission believes the customer information is needed in the event of a mass transition and believes that ERCOT's proposal offers a relatively low-cost solution. It is the commission's intent that ERCOT develop the single standard file format, the required data elements, and the process for populating and sending the files, in its usual process. The commission agrees that the rule needs to clarify that REPs have the responsibility to submit timely, accurate, and complete files in the event of a mass transition, as well as in the verification tests. ERCOT shall finish designing this process and implement it as soon as feasible, but the commission declines to give ERCOT an initial "hard" deadline to complete the task, but ERCOT shall make every effort to have the process finished by December 31, 2006. However, if it is not possible for ERCOT to design and implement the process by December 31, 2006, ERCOT shall finish implementation of the process no later than July 1, 2007.

ERCOT stated that it should be assigned the duty of initiating mass transition of customers to POLR, but, ERCOT does not believe that it will be capable of acting in this role by December 31, 2006. RMC replied that it supported the proposal that ERCOT generates the Texas SET transactions to initiate the mass transition process on behalf of the POLRs and supports a December 31, 2006 timeframe.

TDUs suggested in reply comments that the proposed rule reflect the possibility that in the future, ERCOT, rather than the TDU will provide historic usage data to the POLR.

Commission response

The commission agrees that in the future, ERCOT shall initiate a mass transition to POLR instead of the POLR REP. ERCOT shall make every effort to implement this process as soon as possible, and in the event that ERCOT is not capable of acting in this role by December 31, 2006, ERCOT shall have the capability to implement the process no later than July 1, 2007. The commission agrees with the TDUs that in the future, it may be possible for ERCOT to provide historic usage data instead of the TDU, but disagrees that the rule need to reflect that ERCOT shall assume that responsibility at this time as there has not been a problem identified with the TDUs supplying the historic usage data.

ERCOT stated that Section 1.3 of the ERCOT Protocols already provides for the information described in subsection (n)(9) of this section to be treated confidentially as Protected Information. Therefore, an additional confidentiality agreement is a duplicative, unnecessary administrative burden. ERCOT suggested that this subsection merely reference the fact that the information should be maintained as Protected Information, pursuant to the ERCOT Protocols. RMC replied that it agreed with ERCOT's comment that an additional confidentiality agreement to transfer customer usage and demand data prior to the transition of the customer to the POLR provider is "duplicative and unnecessary." RMC stated that customers are also protected by §25.472(b) of the customer protection rules, which give a REP, TDSP, or ERCOT the right to obtain customer information to facilitate a necessary market transfer such as transferring a customer to POLR.

The TDUs commented that the existing ERCOT Protocols addressing confidentiality of information are not necessarily suf-

ficient to allow the TDU to release confidential information to POLRs without customer permission. The better approach is for the rule to expressly state that release of such information by the TDU will not violate the customer protection rules that address confidentiality.

TSCC commented that subsection (n)(9) and (10) of this section should provide that the confidentiality agreement under which customer information may be provided to the POLR shall be a standard confidentiality agreement approved by the commission.

Commission response

The commission agrees that the rule language needs to expressly state that the release of information from a TDU to a POLR in a transition event does not violate the customer protection rules that address confidentiality and that an additional confidentiality agreement is not necessary. The commission has modified the rule language to clarify this intent.

ERCOT and TDUs stated that the rule should make clear that the current practice of transferring historic usage and demand data using the 867_02 Texas SET transaction, in response to an electronic switch request, is the appropriate way of supplying this information to the POLR. TDUs stated that if POLRs are interested in getting the information quickly, they simply need to send the switch request expeditiously. The only reason to require that usage data be supplied by any other method is if the commission agrees with TSCC that the POLR should be given usage information prior to initiating the switch request. The purpose would be to allow the POLR to second guess the assignment of the customer, protest the assignment, and collect a deposit before ever initiating the switch. The TDUs believe that the published amendments indicate that the commission does not favor this approach, and that the switch is not to be delayed while the POLR checks the assignment, protests it or collects a deposit, and thus there is no rationale for providing usage data on any basis other than as an electronic response to a Texas SET transaction requesting a switch.

TSCC stated in reply comments that the commission should reject TDUs request that the transition process may only utilize the Texas SET process as Texas SET is not fool-proof, and errors can occur.

TDUs suggested in reply comments that the language in the proposed rule that says that supplemental information may be provided through other formats be deleted. The TDUs are concerned that POLRs may seek to avoid the current, established process of information sharing through Texas SET electronic format, citing this language. TDUs suggested that if the language is retained, the commission should make clear that supplementation through means other than Texas SET should only occur in very exceptional circumstances, such as when electronic transaction fail, and only at the option of the entity supplying the information. RMC replied it agreed with TDUs that Texas SET should be the primary means for transferring a customer's usage and demand information, but also stated that there may be exceptional circumstances or emergency situations in which TDUs and POLR providers need to process transactions outside the Texas SET transactions.

Commission response

The commission agrees that the Texas SET process is the appropriate fashion for historic usage and demand data to be transferred to a POLR provider. The commission agrees that to get historical usage data in an expeditious fashion, a POLR should submit the switch request expeditiously. It is not the intent of the commission that the transition process be delayed for any reason, as delays place additional cost upon all market participants. It is the intent of the commission that the transition process be as expeditious as possible and it is for this reason that the commission desires ERCOT to initiate transition switches once it is capable of doing so and why previous commission response indicated that the postcard notification requirement should be waived in a POLR transition event. The commission declines to delete the rule language that states that supplemental data may be provided through other formats as there may be a circumstance when supplemental data is required. The commission agrees with TDUs that to clarify its intent the rule language has been modified to reflect that supplementation shall only occur after a switch has been submitted by a POLR provider or initiated by ERCOT, and that such supplementation should only occur under exceptional circumstances, at the option of the entity supplying the information.

TSCC commented that subsection (n)(11) of this section imposes a major risk and economic burden on the POLR by requiring a POLR to begin serving a customer even if the customer has not paid a deposit by the service initiation date and that the POLR is also prohibited from disconnecting a customer until the appropriate time period to submit the deposit has elapsed. TSCC commented that POLR pricing is not designed to support non-paying customers. In reply comments TDUs stated that the proposed amended rule provides a fair balance between the POLR's need for a deposit and protection for customers as the proposed rule facilitates a seamless transition of customers to a POLR without the delay that would be caused were the POLR allowed to make a customer deposit a prerequisite to initiation of service. TDUs also stated in reply comments that favorable POLR pricing and terms and conditions are designed in a manner to address the added risks associated with serving customers transferred to a POLR, and that allowing the POLR to disconnect a customer who fails to pay the deposit, adequately protects the POLR. TDUs stated that allowing a POLR to refuse service to a customer transitioned to its service undermines the very purpose of the POLR in the competitive retail market. TDUs noted that TSCC failed to recognize that the POLR Terms of Service Agreements state that POLR providers will require payment of the initial cash deposit within ten days of receiving confirmation from the Registration Agent of the effective date a customer becomes a customer of the POLR. This language contradicts TSCC's assertion that the current terms do not obligate a POLR to provide service unless a customer first pays a deposit.

TSCC stated in reply comments that the commission should reject the TDUs point that the transition process should not particularly allow time for a POLR to collect a deposit. TSCC stated that if POLRs are not going to be permitted to protect themselves against incurring loss and unrecovered costs in advance of being compelled to provide this regulated service, then they should be afforded the same protections against loss and unrecovered costs that the TDUs are afforded in providing their regulated services. Just as the commission has authorized TDU tariff mechanisms for uplifting to the market the TDUs' bad debt and UFE costs, then the commission must fashion a similar cost recovery mechanism for POLRs. TDUs disagreed with TSCC in reply comments and stated that the role of the POLR is to provide immediate and seamless service to customers whose REP has left the market, and that the costs of doing so are accounted for through favorable POLR rates and terms and conditions.

TDUs commented that market participants have been working to decrease the time necessary for accomplishing the transition and the process should not be delayed while the POLR researches the customer's usage and calculates and collects a deposit. The TDUs stated that the intent of this subsection of the proposed rule is in agreement with this approach, and is intended to expedite the transition process by providing that payment of a customer deposit shall not be a condition of initiating POLR service. However, the TDUs recommend modifications to the proposed language to clearly reflect that intent.

Commission response

The commission disagrees with TSCC that a POLR should be allowed to collect a deposit before initiating POLR service. While this point is currently in the rule language, the commission has modified the rule language to make this point more explicit and unambiguous, consistent with the recommendation of TDUs. The purpose of POLR service is to provide continuity of service. Continuity is not to be delayed or interrupted for the collection of a deposit. Upon initiating a mass transition switch, a POLR provider will receive the historic usage data necessary to calculate any deposit the POLR provider may require. A POLR provider shall begin serving the POLR ESI ID upon transition to the POLR regardless of if any required deposit has been received, to ensure continuity of service. A POLR provider then has the right to disconnect a customer (ESI ID) that does not submit a required deposit. This is consistent with the Customer Protection Rules that only allow the REP serving a customer to request a disconnection for non-payment and that allow ten days for the payment of a deposit before a disconnection for non-payment can be enacted. To address the risk associated with potentially serving large non-residential customers for ten days before a deposit is due, for the large non-residential customer class, any required deposit shall be due three days from the day the deposit is requested, after which disconnection for non-payment can be enacted, assuming the REP requesting the disconnection has the authority to do so. The commission's intent will become even more important as revisions to the mass transition process are made that shorten the transition timeframes. The commission disagrees with TSCC that the commission must allow POLR providers to uplift unrecovered costs. The commission notes that the POLR obligation is a requirement to be certified as a REP and the POLR rate is intended to reflect the risk of providing POLR service. POLR service is not risk free, but the commission believes that the risk is appropriately accounted for in the POLR rate formula, making uplift unwarranted.

RMC commented that proposed subsection (n)(11) of this section should be amended so that the deposit can be waived upon a customer's request. RMC commented that if a customer contacts the POLR and affirmatively asks for a deposit waiver, then the REP and customer are engaged in a dialogue that would facilitate receiving the necessary information to show that the customer has satisfactory credit and does not need to pay a deposit.

Commission response

The commission agrees with RMC that deposits should be able to be waived upon a customer's request as long as the waiver provisions are uniformly applied in a non-discriminatory fashion, and has modified the rule language accordingly.

OTTA recommended that any customer who is the subject of a "mass" transfer to POLR due to a default by the REP should not be required to pay any deposit amount. OTTA recommended that the POLR rule require all REPs to contribute to a pool of funds to shield residential and small commercial customers from any obligation to pay a deposit for POLR service due to the default of their prior REP and the mass transfer of customers to the POLR. OTTA recommended that low income customers should be exempt from a deposit requirement for POLR service. RMC stated in reply comments that it opposes the deposit proposals of OTTA because they are inconsistent with the current practices and have no statutory support. TSCC stated in reply comments that the commission should reject OTTA's comment that a POLR should not be allowed to require a customer to provide a deposit before initiating service in cases where the prior REP defaults. TSCC maintains that a deposit is absolutely necessary before service begins to safeguard against the customer's default.

Commission response

The commission agrees with the comments of RMC and declines to adopt the recommendations of OTTA as there is no statutory support to require all REPs to pay into a "pool" to subsidize the deposit requirements of transitioned customers. The commission has previously rejected the argument of TSCC that POLR providers must have a deposit before POLR service begins and reiterates the rejection here as the position of TSCC ignores the role of POLR service to provide continuity of service and ignores the fact that the POLR rate compensates the POLR provider for the level of risk associated with POLR service. If TSCC's position were adopted, it would be inappropriate for the POLR rate to be anything higher than the POLR provider's cost to serve, as risk will have been eliminated. This would be inconsistent with the position that POLR service is not meant to be a competitive market rate.

ERCOT recommended that in scenarios when a REP is requesting a voluntary mass transition of its customers to the POLR, the REP should file its request with the commission because the commission, not ERCOT, is in the best position to determine whether the REP is using the POLR as a means to eliminate non-profitable contracts. Upon direction from the commission, ERCOT would initiate the mass transition in this scenario. ERCOT recommended that the rule provide that any mass transition to POLR must involve all of the customers of record assigned to the departing REP at the time of initiation of the mass transition. ERCOT also commented that the rule should include another reason for the initiation of a mass transition event - an order entered by a court of competent jurisdiction or other applicable governmental authority. RMC stated in reply comments that it supports ERCOT's proposed rule change that when a REP exits the market, all customers of record assigned to the REP be included in the transfer and with ERCOT's recommendation that a judicial order could serve to initiate a mass transition of ESI IDs from a REP.

Commission response

The commission declines to adopt the recommendation of ERCOT that the commission must approve a voluntary mass transition. The reason being that time may be of the essence and waiting for a commission Open Meeting may cause the financial complications that a REP was trying to avoid with the voluntary transition. To avoid the problem of having to "judge" if the REP is using a mass transition to eliminate non-profitable contracts, the commission agrees with ERCOT that all ESI IDs of the transitioning REP shall be subject to the mass transition to POLR. In addition, it should be noted that a mass transition event may lead to de-certification of the transitioning REP. The commission also agrees that a judicial order could be the cause of the initia-

tion of a mass transition. The commission has modified the rule language consistent with these positions.

RMC commented that it supports the implementation of an automated process as described in proposed subsection (n)(13) of this section where ERCOT would streamline the mass transition process by initiating customer transfers to POLR and by offering alternatives to the TDUs to provide meter reads in a more expedited manner. RMC stated that the subsection should be modified to make the automated process mandatory by year-end. ERCOT commented that it supported the concept of ERCOT generating the transactions on behalf of the POLRs in mass transition events and recommended that the commission authorize it as part of this rulemaking in order to implement it as soon as possible. ERCOT requested authorization for the process as part of this rule, with the methodology to be developed through the stakeholder process and approved by the ERCOT Board, while being allowed a reasonable amount of time to incorporate these requirements. TSCC commented that subsection (n)(13) of this section should be revised to require ERCOT, by December 31, 2006, to revise the mass transition process so that it is initiated by ERCOT, and to design and implement the necessary procedures. TDUs agreed that ERCOT should initiate the switch to shorten the time needed for a transition and also stated that the rule should clarify that ERCOT will utilize Texas SET for this purpose. TDUs stated in reply comments that the Texas SET Working Group, in conjunction with input from the Mass Transition Task Force has published a timeline that reflects the willingness of a majority of market participants to implement this process by December 31, 2006. The TDUs therefore recommend that the commission urge ERCOT to either meet the implementation date agreed to by the market participants.

Commission response

The commission agrees that in an effort to shorten the mass transition time frame as much as possible, ERCOT should initiate switches to POLR through the Texas SET process and that ERCOT shall make every effort to implement this process as soon as possible, and in the event that ERCOT is not capable of acting in this role by December 31, 2006, ERCOT shall have the capability to implement the process no later than July 1, 2007. The methodology for the process may be developed through the stakeholder process and approved by the ERCOT board.

RMC also stated that the rule should require that a TDU provide a meter read within two days of receiving the transaction to move a customer to POLR under a mass transition. In the case of mass transition, the TDU has the option of providing the meter read through one or a combination of the following options: actual meter reads, advanced metering data, or estimates. This portion of the mass transition solution should be implemented with this rulemaking and does not require a change to any ERCOT systems. ERCOT also supported the use of estimated meter reads by TDUs to effectuate switches. ERCOT acknowledged that an actual meter read is preferred whenever feasible, but recommended that TDUs be authorized to estimate meter reads to effectuate switches during a mass transition event, as the TDUs deem necessary in order for the TDUs to meet their meter reading timeline obligation during mass transition events. ERCOT also suggested that meter reading estimation activity conducted in connection with a mass transition event not be included in TDU meter reading performance metrics. In reply comments, the TDUs stated that they agree with ERCOT and RMC that the TDUs should be provided options for the manner in which meter reads are conducted to effectuate expeditious customer switches to a POLR, including the use of estimated meter reads, which should not be counted against the TDU's meter reading performance measures.

Commission response

The commission agrees with RMC that in an effort to shorten the time frame involved in mass transitions to POLR providers, the TDU must provide a meter read within two calendar days of receiving the transaction to move a customer to a POLR provider. While an actual meter read may be preferable, due to the two calendar day time frame the TDU may estimate the meter reads associated with a mass transition where the ESI ID does not have a meter that allows for reading in a fashion other than a physical meter read, which is the scenario envisioned in Chapter 4.3.4 CHANGING OF DESIGNATED COMPETITIVE RETAILER, of the commission adopted Pro-Forma Retail Delivery Tariff in Project Number 29637, *Rulemaking To Amend P.U.C. Subst. R. §25.214 And Pro-Forma Retail Delivery Tariff*. Consistent with Chapter 4.7.2.2, ESTIMATES FOR REASONS OTHER THAN FOR DENIAL OF ACCESS BY RETAIL CUSTOMER, of the Pro-Forma Tariff in Project Number 29637, an estimated meter read for the purpose of a mass transition to POLR shall not be considered a break in a series of consecutive months of estimates, but shall not be considered a month in a series of consecutive estimates performed by the TDU.

RMC commented that the TDUs should not charge POLRs out-of-cycle meter reads in a mass transition because the POLR cannot pass this fee to POLR customers, but that the appropriate policy should be that those costs are borne by the entity causing the mass transition, the exiting REP, and not the acquiring REP or POLR. The TDUs commented that they strongly disagree with RMC that the exiting REP should be billed for the costs of the out-of-cycle meter read or estimate required in the event of a mass transition of customers to a POLR.

Commission response

The commission has already ruled on this issue. Consistent with Chapter 6.1.2.1 STANDARD DISCRETIONARY CHARGES, of the Pro-Forma Tariff in Project Number 29637, out-of-cycle meter reads or estimates for the purpose of a mass transition shall be charged to the exiting competitive REP. The rule language has been modified to clarify this intent.

ERCOT commented that the mass transition timelines for all parties should be established using calendar days, as opposed to business days, as the unit of measure. TSCC replied that it supports ERCOT's recommendation to use calendar days, rather than business days, in all transition timelines, as this would more accurately reflect the service provided to customers.

Commission response

The commission agrees with the comments of ERCOT and TSCC that all mass transition timelines should be established using calendar days and has modified the rule language accordingly as calendar days more accurately reflects the service provided to customers and the need for expedited treatment of mass transition events.

ERCOT suggested that in subsection (n)(14) of this section, the information to be provided to POLRs not include a customer's service address, most recent twelve months of usage and demand data and TDU charges. ERCOT stated that the customer's service address can be obtained through the ERCOT Texas Market Link or through public extracts and that requiring the departing REP to provide the customer's service address creates the

potential for a data synchronization conflict between the REP's data and ERCOT systems. ERCOT also stated that the customer's most recent twelve months of usage and demand data can be provided by the TDU through Texas SET transactions. TDUs replied that they agree with ERCOT and added that RMC had requested that the exiting REP also provide the customer's meter class, meter type, language preference, tax ID or social security number, designation as low income eligible, and designation as critical care or critical load, but it is not clear as to the benefit of such information to the POLR, and thus TDUs do not believe it is helpful or necessary to include this additional information.

TSCC commented that subsection (n)(14) of this section should be revised to include a deadline for the transitioning REP to provide the listed information to the appropriate POLR provider, and the deadline should be that the information is provided at the same time as the REPs written request to the POLR for the transfer of customers. Additionally, there should be a requirement that the appropriate TDUs or ERCOT provide all the listed information in their possession to the POLR in the event the transitioning REP is unable or unwilling to provide the information, or has already exited the market, with a two day deadline. TDUs stated in reply comments that the switch request should be the triggering event for the provision of historic usage data and it will be provided almost immediately in response to a switch request coming from the POLR or ERCOT. Therefore, rather than putting a deadline on the provision of information, the process of transitioning customers to the POLR can best be sped up by requiring the POLR or ERCOT to send a switch request initiating the switch, as soon as possible. RMC stated in reply comments that the two-business day standard should be included in proposed subsection (n)(14) of this section, which deals with transfer of information from the defaulting REP to the POLR provider and to the extent the customer information repository requirement is not eliminated, the two-business day standard should also be included in proposed subsection (n)(8) of this section.

TDUs questioned the value of a REP's obligation to share with the POLR a customer's account number with the REP that is losing the customer and the customer's TDU charges. Without further clarification as to the benefit of a REP providing such information to the POLR, the TDUs propose deleting subparagraphs (C) and (J) of this proposed rule revision. RMC stated in reply comments that they have found the customer account number to be useful in determining ESI IDs that are for the same customer and that the information helps in customer contact and billing inquiries, and therefore finds no reason for this item to be removed from the list of information an exiting REP must provide.

Commission response

The commission agrees with ERCOT and the TDUs and has revised the list of information to be provided to not include a customer's service address, most recent twelve months of usage and demand data and TDU charges as the information is already readily available. The commission declines to add the additional items listed by RMC as the additional benefit is unclear. The commission agrees with TDUs that the initiation of a switch to the POLR provider is the triggering event for the provision of customer data. The commission declines to put a deadline on TDUs and ERCOT to provide any information in their possession that an exiting REP did not provide and notes that historical usage information will be provided when the switch is initiated by ERCOT or the POLR provider and that a customer information repository will address the missing data issues. The commission agrees with RMC that the customer's account number may be useful information and therefore declines to delete it from the list.

§25.43(o) - Termination of POLR status

RMC commented that proposed subsection (o)(2) of this section provides that if a POLR defaults or has its status revoked, the responsibility for its POLR duties will be assumed by the next eligible POLR. This proposed provision would only impact the designation of the five non-volunteering POLR providers under the proposed rule. Since RMC recommended in subsection (i) of this section, that all eligible POLR REPs should be part of the non-volunteering POLR provider pool, there is no reason to designate that the next eligible POLR REP will take its place because all eligible POLR REPs are already part of the allocation.

TSCC commented that it is not clear who the "next REP" is referring to and should be clarified.

Commission response

The commission has declined to make the recommended change of RMC to subsection (i) of this section, which makes its comments in subsection (o) of this section, moot. The commission therefore declines to incorporate the comments of RMC. The commission agrees with TSCC that the reference to the "next REP" should be clarified and has modified the rule language accordingly.

RMC stated that at the end of a POLR term, POLR customers who do not select another provider may either be served by the outgoing POLR through a competitive affiliate at a rate specified by the competitive affiliate or may be terminated to the incoming POLR. For those customers who do not select another REP at the end of the POLR term, in addition to transferring customers to a competitive product of an affiliate, the REP serving as POLR should be allowed to transfer the customers to one of its own competitive offerings. Therefore, RMC stated that subsection (o)(3)(A) and (C) of this section should be modified to reflect that a single entity may provide both a POLR function and a competitive function.

Commission response

The commission agrees with RMC that the rule language should make it clear that a single entity may provide both a POLR function and a competitive function and has made corresponding changes to the rule language.

RMC commented that a provision similar to the one that has been proposed for deletion in subsection (o)(3)(B) of this section should be reinstated because unless the waiver provision is reinstated, if the outgoing POLR chooses the competitive affiliate option, an argument can be made that the competitive affiliate is acquiring customers and is subject to the notice requirements of §25.493.

Commission response

The commission agrees with the comments of RMC and has modified the rule language accordingly as it is not the commission's intent to make the competitive affiliate of the POLR subject to the notice requirements of §25.493.

§25.43(q) - Reporting requirements

RMC commented that as of June 1, 2004, the commission's rules gave all REPs the right to disconnect customers for non-payment. As a result, AREPs and POLRs are no longer the only entities disconnecting customers. It would therefore be discriminatory and unfair to require the AREPs and POLRs to continue to

report this disconnection information, while other REPs that also disconnect customers have no such obligation. Therefore, RMC recommended that subsection (q) of this section be deleted in its entirety. However, if there is any POLR-specific information that commission believes it needs, any reporting requirement that remains should be very specific and should be applicable to POLR providers only.

Commission response

The commission disagrees with the comments that requiring information from POLR providers is discriminatory as §25.482 requires customers terminated for reasons other than non-payment to be transitioned to a POLR provider and customers terminated for non-payment to be transitioned to the AREP. While all REPs potentially have disconnection authority, the commission disagrees with RMC that all REPs actually do have disconnect authority. The commission still desires the information required in subsection (q) of this section, to be reported and therefore declines to delete subsection (q) of this section. Consistent with the discussion in other commission responses, it is the intent of the commission that the provisions of §25.482 shall not be applicable as of January 1, 2007. At that time, some of the requirements of subsection (q) shall become inapplicable.

§25.43(r) - Waiver of customer protection rules

RMC recommended that the entire subsection be deleted for the following reasons. In subsection (r)(1) of this section, the provisions of §25.475(e) that require the provision of a revised terms of service statement to customers 45 days prior to a material change in the customer's terms of service are waived. The provision is unnecessary because a customer that is being transferred to or chooses POLR service will be served by a REP different from the customer's current provider. The provisions of §25.475(e) are applicable only in situations where a REP is changing its current customer's terms of service. In a POLR scenario, the POLR REP will be providing service to a new customer, not an existing one. Therefore, because §25.475(e) does not apply in such a contact, a waiver of that rule's provisions is not necessary.

TSCC commented that the referenced subsection (b)(3) of this section does not appear to relate to any action requiring the issuance of a revised terms of service statement, nor does §25.483(b) of this title (relating to Disconnection of Service). TSCC stated that it suggests retaining this provision to clarify that a POLR for non-residential customers over 50 kW may provide service on terms that differ from the customer protection rules (other than for slamming, cramming, and complaint handling). RMC stated in reply comments that it agreed with TSCC.

Commission response

The commission agrees with RMC and TSCC that subsection (r) of this section is no longer appropriate as the scenario envisioned in subsection (r)(1) of this section cannot occur as the POLR provider cannot materially change the POLR Standard Terms of Service and the provision does not apply when a customer is transitioned to POLR service, and the scenario envisioned in subsection (r)(2) of this section has been deleted consistent with the discussion in previous commission responses. The commission has therefore revised the rule language to delete subsection (r) of this section. TSCC's recommendation concerning waiver of the customer protection rules is addressed elsewhere in the amended rule and the Standard Terms of Service.

§25.43(s) - Notice of transition to POLR service

Cities recommended that the notice for a transition to POLR service be amended to include a statement of the existing POLR rates so that the customers recognize the significance of the proposed action. In addition, Cities recommended that the notices include customer service contact numbers for the REP, POLR, and the commission, to allow the affected customers to obtain answers about the process and reasons for the POLR transition.

TSCC commented that the second sentence of subsection (s) of this section should be clarified to require the transitioning REP to notify the customer when the REP knows the customer will be transitioned to POLR service, and the POLR to notify the customer as soon as the POLR has the customer information.

OTTA commented that notices to customers that reference the www.powertochoose.org website should also provide a toll free number where the customer can ask for the relevant information that is otherwise provided on the website. RMC agreed in reply comments.

TTP recommended that ERCOT send a notice to customers involved in a mass transitions as soon as a REP defaults. TTP stated that the revision to the rules governing the transition to POLR shifts more responsibility from the REPs to ERCOT at ratepayer expense.

Commission response

The commission agrees with Cities that notice should include the previous month's POLR rate as well as a contact number for the REP and the POLR provider. The commission notes that as there will be multiple POLR providers, the exiting REP will not be able to provide a contact number for the POLR provider in subsection (s)(1) of this section, but the information will be provided in subsection (s)(2) of this section. The commission agrees with TSCC the rule language should clarify the notice requirements as they relate to the timing of the notification. The commission agrees with OTTA and RMC that a toll-free number should accompany the reference to the www.powertochoose.org website for customers that do not have internet access. In light of the notice required in subsections (s)(1) and (2) of this section, the commission declines to adopt the recommendation of TTP that ERCOT also send notice to customers, as such additional notice would be unnecessary.

RMC commented that it agrees that customers should be able to switch from POLR service as soon as practical. However, there are some operational limitations that should be understood as processes are implemented to switch customers from POLR service more quickly. RMC stated that some REPs' systems may result in a speedier switch after an out-of-cycle meter read than others, and if REPs are allowed to use their own internal processes to switch customers effective with the most recent meter read in the system, then the customer would not be billed at the POLR rate for any time period. Instead, the customer would receive a full cycle bill at the competitive product rate.

Commission response

The commission agrees with RMC that there may be variations between REPs in regard to out-of-cycle switches, but the intent is that through an out-of-cycle meter read, a customer transitioned to a POLR provider can switch a REP of choice without having to wait for an entire billing cycle for the choice to become effective. In regard to the second comment of RMC, when a customer is transitioned to a POLR provider, if the customer is marketed to and enrolled in one of the POLR provider's non-POLR pricing

options, that enrollment may be nothing more than an internal process to the REP. While the REP may make any non-POLR pricing option effective with the most recent meter read in the REP's system so that the customer will not be billed at the POLR rate for any time period, it is not the commission's intent to require such treatment.

RMC stated that guidance from the commission would be helpful as to whether the commission wants customers to be moved from the POLR rate as quickly as possible. Another alternative would be for POLR REPs to use a "move-in" transaction to switch the customer from POLR service to a competitive product, but in the past there have been complaints about REPs using move-in transactions to effectuate switches.

Commission response

The commission clarifies that POLR REPs should not use a "move-in" transaction to switch customers from POLR service to a competitive product and competitive REPs should not use a "move-in" transaction to switch a POLR customer away from the POLR provider to the competitive REP. The use of a "move-in" transaction causes unintended complications such as the resetting of demand ratchets and the loss of critical-care designation and is therefore inappropriate to be used to expedite a switch in anything other than extreme circumstances, or when necessary to re-energize a disconnected customer.

RMC stated in reply comments that it disagrees with TDUs' recommendation that subsection (s)(2)(G) be revised to state that the "special or out-of-cycle meter read" will be charged at the discretion of the gaining REP.

Commission response

The commission agrees with TDUs that while an out-of-cycle meter read is a discretionary charge, that charge is applied to the REP and not the customer. The REP then makes the decision of whether or not to pass the cost along to the customer. Whether or not to pass along such cost may be a determining factor in a customer's decision of which REP to switch service to. The rule language has been modified accordingly to clarify this fact.

§25.43(t) - Disconnection by POLR

RMC stated that POLR REPs must comply with the applicable customer protection rules afforded each customer class, as well as the provisions of §25.43 and the Standard Terms of Service included in §25.43 and therefore, the inclusion of subsection (t) of this section is redundant and not necessary.

TSCC proposed that ERCOT should attribute a meter to a POLR only for the period of time the POLR has agreed to provide POLR service meaning that if any charges attributable to the meter are incurred after the date the POLR has requested the meter be disconnected, such charges should be tracked by ERCOT and charged to the responsible TDU. In reply comments, the TDUs disagreed with TSCC's proposal and stated that the Pro Forma Retail Delivery Tariff, as well as the Customer Protection Rules, address the procedure for requesting disconnection, the timeline for performing the service, and when the responsibility of the REP for the customer ends. There is no reason to treat disconnections requested by the POLR differently, and there is no way to identify in the system of the TDU whether a disconnection request comes from a POLR or a REP. ERCOT noted in reply comments that it has no process to track disconnect notices or to charge TDUs for charges attributable to a meter and believes that the creation of such a process would not be a cost efficient solution for situations where a TDU does not disconnect a customer on the date requested by a POLR.

Commission response

The commission disagrees with RMC that subsection (t) of this section is not necessary. Numerous questions have been raised in regard to the transition process, including when a POLR provider must initiate service to a transitioned customer and when the POLR provider has the right to disconnect a transitioned customer who fails to pay a required deposit. The intent of subsection (t) of this section is to eliminate ambiguity by making it clear that only the REP (or POLR REP) serving a customer may request disconnection of a customer, and the disconnection may not occur until after proper notice and after the appropriate payment period has elapsed. In other words, a POLR provider's obligation begins when a customer is transitioned to the POLR provider and the customer shall not be required to pay a deposit to initiate POLR service, but a deposit may be required to prevent disconnection after POLR service has been initiated. It is the commission's intent that subsection (t) of this section clarify these points.

The commission agrees with the TDUs that there is no reason to treat disconnections requested by a POLR provider differently than from any other REP and acknowledges that a TDU will not know whether a disconnection request is from a POLR provider as opposed to any other REP. The commission notes that the volunteer POLR REP system and the marketing of non-POLR rate products to transitioned customers would further blur the line of a REP acting as a POLR in regard to disconnection.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2005) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 14.052, and 39.202.

§25.43. Provider of Last Resort (POLR).

(a) Purpose. The purpose of this section is to ensure that, as mandated by the Public Utility Regulatory Act (PURA) §39.106:

(1) A basic, standard retail service package will be offered by a POLR or multiple POLRs at a fixed, non-discountable rate to any requesting customer in all of the Texas transmission and distribution utilities' (TDUs') service areas that are open to competition; and

(2) All customers will be assured continuity of service if their retail electric provider (REP) defaults pursuant to subsection (n)(12) of this section and, until January 1, 2007, if their REP terminates service in accordance with the termination provisions of Subchapter R of this chapter (relating to Customer Protection Rules for Retail Electric Service).

(b) Application; termination of service for non-payment.

(1) This section applies to REPs that may be designated as POLRs in TDU service areas in Texas. This section does not apply when an electric cooperative or a municipally owned utility (MOU) exercises its right to designate a POLR within its certificated service area. However, this section is applicable when an electric cooperative delegates its authority to the commission in accordance with subsection

(p) of this section to select a POLR within the electric cooperative's service area.

(2) POLR service for a residential or small non-residential customer of a competitive REP whose electric service is terminated for non-payment under the provisions of §25.482 of this title (relating to Termination of Contract) shall be provided by the affiliated REP for that POLR area. In the case of the territory encompassed by Sharyland Utilities, LP, the affiliated REP shall be deemed to be First Choice Power, Inc, the entity providing default service in that area. The provisions of this section do not apply to any affiliated REP serving non-paying residential and small non-residential customers of competitive REPs except as otherwise specifically stated herein. As of January 1, 2007, this paragraph will expire and REPs will not be permitted to terminate customers to POLR for any reason except pursuant to a mass transition for the reasons described in subsection (n)(12) of this section.

(3) POLR service is intended to provide continuity of service, and is available to any requesting customer and any customer that is transitioned to POLR service consistent with this section. The POLR rate must reflect the inherent level of risk associated with POLR service. POLR service is envisioned as a temporary service and the POLR rate is not intended to be a competitive offering, but a cost and risk based offering.

(4) For 2006, all timeframes and deadlines that pertain to the eligibility and selection of POLR providers shall be extended by one day for every day that the effective date of this section falls after June 1, 2006. The extension shall not apply to the October 15, 2006, deadline to select non-volunteering POLR providers or the December 31, 2006, end of the 2005 - 2006 POLR term.

(c) Definitions. The following words and terms when used in this section shall have the following meaning, unless the context indicates otherwise:

(1) Basic firm service--Electric service that is not subject to interruption for economic reasons and that does not include value added options offered in the competitive market. Basic firm service excludes, among other competitively offered options, emergency or back-up service, and stand-by service. For purposes of this definition, the phrase "interruption for economic reasons" does not mean disconnection for non-payment.

(2) Billing cycle--A period bounded by a start date and stop date that REPs and TDUs use to determine when a customer used a service.

(3) Billing month--Generally a calendar accounting period (approximately 30 days) for recording revenue, which may or may not coincide with the period a customer's consumption is recorded through meter readings.

(4) Large non-residential customer--A non-residential customer, at the time of the transition to POLR service having a peak demand in the previous 12-month period at or above one megawatt (MW).

(5) Medium non-residential customer--Beginning January 1, 2007, a non-residential retail customer, at the time of the transition to POLR service having a peak demand in the previous 12-month period of 50 kW or greater, but less than 1,000 kW.

(6) Non-discountable rate--A rate that does not allow for any deviation from the price offered to all customers within a class, except as provided in §25.454 of this title (relating to Rate Reduction Program).

(7) Non-volunteering POLR provider--A REP that has been selected to provide POLR service consistent with subsection (j) of this section.

(8) POLR area--The service area of a TDU in an area where customer choice is in effect, except that the POLR area for AEP-Texas Central Company shall be deemed to include the area served by Sharyland Utilities, L.P.

(9) Provider of last resort (POLR)--A REP certified in Texas that has been designated by the commission to provide a basic, standard retail service package in accordance with this section. There may be multiple POLR providers in a TDU service area. The term POLR, when used as a noun, refers to both a volunteer POLR REP and a non-volunteer POLR provider.

(10) Residential customer--Retail customers classified as residential by the applicable transmission and distribution utility tariff or, in the absence of classification under a residential rate class, those retail customers that are primarily end users consuming electricity for personal, family, or household purposes and who are not resellers of electricity.

(11) Small non-residential customer--Beginning January 1, 2007, a non-residential retail customer, at the time of the transition to POLR service having a peak demand in the previous 12-month period of less than 50 kW. Prior to January 1, 2007, a non-residential retail customer having a peak demand of less than 1,000 kW.

(12) Volunteer POLR REP--A REP that has voluntarily agreed to provide POLR service consistent with subsection (i) of this section.

(d) POLR service.

(1) For the purpose of POLR service, beginning with the 2007 - 2008 POLR term, there will be four classes of customers: residential, small non-residential, medium non-residential, and large non-residential.

(2) The POLRs may be designated to serve any or all of the four customer classes in a POLR area. Within the customer class it is designated to serve, the POLRs shall provide service to the following customers:

(A) Any customer requesting POLR service;

(B) Any customer assigned to the POLR pursuant to a mass transition for the reasons described in subsection (n)(12) of this section; and

(C) Until January 1, 2007, any customer not receiving service from its selected REP for any reason other than non-payment who is automatically assigned to the POLR.

(3) The POLRs shall offer a basic, standard POLR retail service package, which will be limited to:

(A) Basic firm service;

(B) Call center facilities for customer inquiries;

(C) Standard retail billing (which may be provided either by the POLR or another entity);

(D) Benefits for low-income customers as provided for under PURA §39.903 relating to the System Benefit Fund; and

(E) Standard metering, consistent with PURA §39.107(a) and (b) (which may be provided either by the POLR or another entity).

(4) A POLR and any REP affiliated with the POLR shall make the same competitive products and services available to a POLR customer as they would to a similarly-situated non-POLR customers.

(5) The POLRs shall, in accordance with §25.108 of this title (relating to Financial Standards for Retail Electric Providers Regarding the Billing and Collection of Transition Charges), provide billing and collection duties for REPs who have defaulted on payments to the servicer of transition bonds or to TDUs.

(6) Each POLR customer billing for residential customers shall notify the customer that other competitive products or services may be available from the POLR, a REP affiliated with the POLR, or another competitive REP, and shall include contact information for the POLR and the Power to Choose, and shall include a notice from the commission in the form of a bill insert or a bill message with the header "A Message from the Public Utility Commission" addressing why the customer has been transitioned to POLR, the continuity of service purpose and temporary nature of POLR service, the need to choose a competitive product or provider, and information on competitive markets to be found at www.powertochoose.org, or toll-free at 1-866-PWR-4-TEX (1-866-797-4839).

(e) Standards of service.

(1) A REP who has been designated by the commission to serve as a POLR for a class in a given POLR area shall serve any customer in that class as described in subsection (d)(2) of this section.

(2) A POLR shall serve any POLR customer, as described in subsection (d)(2) of this section, according to the Standard Terms of Service in subsection (f)(1) of this section for any POLR customer's respective customer class, except that beginning with the 2007 - 2008 POLR term, POLRs may charge a rate less than the POLR rate, if it is applied uniformly to all POLR customers. This paragraph is not intended to prohibit POLR customers from enrolling in a non-POLR product or service provided by the REP serving as a POLR or a REP affiliated with the REP serving as a POLR.

(3) A POLR shall abide by the applicable customer protection rules as provided for under Subchapter R of this chapter, except that if there is an inconsistency or conflict between this section and Subchapter R of this chapter, the provisions of this section shall apply. For the medium non-residential customer class, the customer protection rules as provided for under Subchapter R of this chapter shall be waived, except for §25.481, relating to Unauthorized Charges, §25.485(a) - (b), relating to Customer Access and Complaint Handling, and §25.495, relating to Unauthorized Change of Retail Electric Provider. In addition, the POLR shall be held to the following general standards:

(A) The POLRs shall inform any customer transferred to it, that the POLR is now providing service to the customer and shall disclose all charges for which the customer will be responsible; and

(B) The POLRs may not require that a customer sign up for a minimum term as a condition of POLR service, except that if the POLR offers a level or average payment plan in accordance with Subchapter R of this chapter. A residential or small or medium non-residential customer who elects to receive POLR service under such plan may be required to sign up for a minimum term of no more than six months.

(f) Customer information.

(1) The Standard Terms of Service prescribed in subparagraphs (A) - (D) of this paragraph are effective for all POLR service beginning with the 2007 - 2008 POLR term. These forms may be changed through the rulemaking process and are available in the commission's Central Records Division and on the commission's website at www.puc.state.tx.us.

(A) Standard Terms of Service, Provider of Last Resort (POLR) Residential Service:
Figure: 16 TAC §25.43(f)(1)(A)

(B) Standard Terms of Service, Provider of Last Resort (POLR) Small Non-Residential Service:
Figure: 16 TAC §25.43(f)(1)(B)

(C) Standard Terms of Service, Provider of Last Resort (POLR) Medium Non-Residential Service:
Figure: 16 TAC §25.43(f)(1)(C)

(D) Standard Terms of Service, Provider of Last Resort (POLR) Large Non-Residential Service:
Figure: 16 TAC §25.43(f)(1)(D)

(2) The POLRs shall provide each new POLR customer the Standard Terms of Service applicable to the specific customer. Such Standard Terms of Service shall be updated as required under §25.475(d) of this title (relating to Information Disclosures to Residential and Small Commercial Customers.)

(g) General description of POLR selection process.

(1) All REPs shall provide information to the commission in accordance with subsection (h)(1) of this section. Based on this information, the commission's designated representative shall designate REPs that are eligible to serve as POLRs in areas of the state in which customer choice is in effect, except that the commission shall not designate POLRs in the service areas of MOUs or electric cooperatives unless an electric cooperative has delegated its POLR designation authority to the commission in accordance with subsection (p) of this section.

(2) The commission shall select REPs that will provide POLR service for two-year terms as specified in paragraph (3) of this subsection. The POLR rate shall be established under the provisions of subsection (k) of this section.

(3) POLRs shall serve two-year terms beginning in January of each odd-numbered year. The initial term for POLR service in areas of the state where retail choice is not in effect as of the effective date of the rule shall be set at the time POLRs are initially selected in such areas.

(h) REP eligibility to serve as POLR. In each even-numbered year, beginning with 2006, the commission shall determine the eligibility of certified REPs to serve as a POLR for the term scheduled to commence in January of the next year.

(1) All REPs shall provide information to the commission necessary to establish their eligibility to serve as POLR for the next POLR term. All REPs shall file, by July 10th, of each even numbered year, by service area, information on the classes of customers they provide service to, the number of ESI IDs the REP serves in each POLR customer class, the total number of ESI IDs in each POLR customer class, the amount of MWhs the REP serves in each POLR customer class for the annual period ending March of the current year, and the total number of MWhs sold by all REPs for each POLR customer class for the annual period ending March of the current year. ERCOT shall make the total ESI ID and total MWh data available to REPs for inclusion in the eligibility filing. All REPs shall also provide information on their technical capability and financial ability to provide service to additional customers in a mass transition scenario. Specific information received from a REP under this subsection shall be treated confidentially if it is submitted to the commission in accordance with the provisions of §22.71(d) of this title (relating to Filing of Pleadings, Documents and Other Materials). However, the commission's determination re-

garding eligibility of a REP to serve as POLR under the provisions of this section shall not be considered confidential information.

(2) Eligibility to be designated as a POLR is specific to POLR area and customer class. A REP is eligible to provide POLR service to a particular customer class in a POLR area, unless:

(A) A proceeding to revoke or suspend the REP's certificate is pending at the commission, the REP's certificate has been suspended or revoked by the commission, or the REP's certificate is deemed suspended pursuant to §25.107(i) of this title (relating to Certification of REPs);

(B) The sum of the numeric portion of the REP's percentage of ESI IDs served and percentage of MWhs served in the POLR area, for the particular class, is less than 1.0;

(C) The commission does not reasonably expect the REP to be able to meet the criteria set forth in subparagraph (B) of this paragraph during the entirety of the POLR term;

(D) On the date of the commencement of the POLR term, the REP or its predecessor, including a REP that has assumed the responsibilities of another REP, will not have served customers in Texas for at least 18 months;

(E) The REP does not serve the applicable customer class, or does not have an agreement with the service area TDU;

(F) The REP is certificated as an Option 2 REP under §25.107(d)(2) of this title;

(G) The REP's customers are limited to its own affiliates;

(H) A REP that files an affidavit stating that it only serves customers subject to the customer protection rules because it was picked by lottery to be a small non-residential customer class POLR for 2005 - 2006 may opt-out of eligibility for the small non-residential customer class;

(I) A REP files an affidavit stating that it does not serve small or medium non-residential customers, except for the low-usage sites of the REP's large non-residential customers, or commonly owned or franchised affiliates of the REP's large non-residential customers may opt-out of eligibility for either, or both of the small or medium non-residential customer classes; or

(J) The REP does not meet certain minimum financial qualifications as determined by the commission.

(3) For each POLR term scheduled to commence in January of the next year, the commission shall publish the names of all of the REPs eligible to provide POLR service for each customer class in each POLR area. A REP may challenge its eligibility determination within five business days of the notice of eligibility by submitting to commission staff additional documentation that includes the specific data, the specific calculation, and a specific explanation that clearly illustrates and proves the REPs assertion. Commission staff shall verify the additional documentation and, if accurate, recalculate the REP's eligibility. Commission staff will notify the REP of any change in eligibility status within ten business days of the receipt of the additional documentation. A REP may then appeal to the commission through a contested case if the REP does not agree with the staff determination of eligibility. The contested status will not delay the volunteer POLR REP list or the selection of the non-volunteering POLR providers.

(4) A REP that is serving as a POLR in accordance with this section shall submit reports not later than March 1 and September 1 of each year providing the information specified in paragraph (2) of this subsection.

(5) A standard form may be created for use in determining REP eligibility to serve as a POLR, that REPs may use to report necessary eligibility information.

(i) Volunteer POLR REP list. Based on the information provided in accordance with this subsection and subsection (h) of this section, the commission shall post on its webpage the REPs that are willing to serve as POLR on a volunteer basis, beginning in 2006 for the 2007 - 2008 POLR term. REPs may submit an indication of their willingness to voluntarily serve as POLR, in a separate filing from the one required in subsection (h) of this section, no earlier than July 10, and no later than July 31, of each even-numbered year. This filing shall include a description of the REP's capabilities to serve additional ESI IDs as well as the REPs current financial condition in enough detail to demonstrate that the REP is capable of absorbing a mass transition of ESI IDs without technically or financially distressing the REP. Specific information received from a REP under this subsection shall be treated confidentially if it is submitted to the commission in accordance with the provisions of §22.71(d) of this title. However, the commission's determination regarding eligibility of a REP to serve as a volunteer POLR REP, under the provisions of this section, shall not be considered confidential information.

(1) A volunteer POLR REP shall provide to the commission the name of the REP, the appropriate contact person with current contact information, which customer classes the REP is willing to serve within each POLR area, and the number of ESI IDs the REP is willing to serve by customer class and POLR area in each transition event.

(2) A REP that has met the eligibility requirements of subsection (h) of this section shall be eligible for the volunteer POLR REP list contingent upon the additional information provided in this subsection.

(3) A volunteer POLR REP shall not charge its POLR customers a rate higher than the POLR rate for POLR service. Any rate charged to POLR customers without the customer's affirmative choice, that is below the POLR rate, must be offered uniformly to all POLR customers. However, a volunteer POLR REP may market to its POLR customers, on a non-discriminatory basis, competitive products using a rate structure other than the POLR rate structure. A POLR and any REP affiliated with the POLR shall make the same competitive products and services available to a POLR customer as are available to similarly-situated non-POLR customers. The volunteer POLR REP, in any marketing to the POLR customer, shall make it clear that the customer has the right to switch to a different REP or take service from the volunteer POLR REP under a competitive product with a rate structure other than the rate structure set out in the POLR's Standard Terms of Service, if the POLR offers such a competitive product. A customer may agree to a long-term contract for non-POLR service with the REP serving as POLR, but the POLR REP shall not represent to the customer that agreeing to a long-term contract is the only option to avoid the POLR rate. If, based on a customer's choice, the volunteer POLR REP enrolls a customer in a competitive product or service, it shall follow the appropriate enrollment process in §25.474 of this title (relating to Selection of Retail Electric Provider). After enrolling in a non-POLR, competitive product or service, the customer shall no longer be considered a POLR customer.

(4) Upon the transition of customers to the POLRs, beginning with the 2007 - 2008 POLR term, ERCOT shall use the volunteer POLR REP list to assign customers to the volunteer POLR REPs in a non-discriminatory manner, before assigning customers to the non-volunteering POLR providers. ESI IDs, up to the total number of ESI IDs that all volunteer POLR REPs specified pursuant to paragraph (1) of this subsection, shall be allocated to the volunteer POLR REPs in the non-discriminatory fashion detailed below. A volunteer POLR REP

shall not be assigned more ESI IDs than it has indicated it is willing to serve. ERCOT shall use the following methodology to ensure non-discriminatory assignment of ESI IDs to the volunteer POLR REPs. If ERCOT has not implemented an automated process to distinguish between the small and medium non-residential customer class, ERCOT shall manually bifurcate the applicable customers until an automated process is implemented. Such automated process shall be implemented no later than July 1, 2007. ERCOT shall:

(A) Sort ESI IDs by TDU service territory;

(B) Sort ESI IDs by customer class;

(C) Sort ESI IDs numerically;

(D) Sort volunteer POLR REPs numerically by randomly generated number; and

(E) Assign ESI IDs in numerical order to volunteer POLR REPs, in the order determined in subparagraph (D) of this paragraph, in accordance with the number of ESI IDs each volunteer POLR REP indicated a willingness to serve pursuant to paragraph (1) of this subsection. If the number of ESI IDs is less than the total that the volunteer POLR REPs indicated that they are willing to serve, each volunteer POLR REP shall be assigned a proportionate number of ESI IDs, as calculated by dividing the number that each volunteer POLR REP indicated it was willing to serve by the total that all volunteer POLR REPs indicated they were willing to serve, multiplying the result by the total number of ESI IDs being transferred to the volunteer POLR REPs, and rounding to a whole number.

(5) Each transition event shall be treated as a separate event.

(6) A volunteer POLR REP may file a request to be removed from the volunteer POLR REP list or to modify the number of ESI IDs it is willing to serve at any time, and such a request shall be effective 30 calendar days after the request is filed with the commission. A volunteer POLR REP shall continue to serve ESI IDs previously acquired through a mass transition event as well as ESI IDs the volunteer POLR REP acquires from a mass transition event during the 30-day notice period.

(7) ERCOT may challenge a volunteer POLR REPs eligibility. If ERCOT has reason to believe that a REP is no longer capable of performing additional volunteer POLR REP responsibilities, ERCOT shall make a confidential filing with the commission detailing the basis for its challenge. Commission staff shall review the filing of ERCOT and if commission staff concludes that the REP should no longer provide POLR service, it shall request that the REP demonstrate that it still meets the qualifications to provide the service. The commission staff may initiate a proceeding with the commission to disqualify the REP from providing POLR service. No ESI IDs shall be assigned to a volunteer POLR REP after the commission staff initiates a proceeding to disqualify the volunteer POLR REP's eligibility, unless the commission by order, confirms the volunteer POLR REP's eligibility.

(j) Non-volunteering POLR providers. The provisions of this subsection shall govern the manner in which the non-volunteering POLR providers for a given POLR area and customer class are selected and serve, beginning with the 2007 - 2008 POLR term.

(1) The REPs eligible to serve as POLRs shall be determined based on the information provided by REPs in accordance with subsection (h) of this section.

(2) In each POLR area, for each POLR customer class, there shall be five non-volunteering POLR providers. The non-volunteering POLR providers shall be the five eligible REPs that have the greatest market share based upon MWhs served, by customer class within the POLR area. The commission's designee shall designate the non-volunteering POLR providers by October 15, of the year preceding the POLR term, based upon the data the commission has at the time of the determination. Selection as a non-volunteering POLR provider does not effect a REPs ability to also serve as a volunteer POLR REP.

(3) In the event of a mass transition of customers to POLR service, customers shall be allocated to the non-volunteering POLR providers only after the volunteer POLR REP list has been exhausted. The customers to be transitioned to the non-volunteering POLR providers shall be allocated to the non-volunteering POLR providers in a non-discriminatory fashion, in accordance with their percentage of market share based upon MWhs served, as determined in paragraph (2) of this subsection, by POLR area and customer class. To ensure non-discriminatory assignment of ESI IDs to the non-volunteering POLR providers, ERCOT shall:

(A) Sort the ESI IDs in excess of the allocation to volunteer POLR REPs, by TDU service territory;

(B) Sort ESI IDs in excess of the allocation to volunteer POLR REPs, by customer class;

(C) Sort ESI IDs in excess of the allocation to volunteer POLR REPs, numerically;

(D) Sort non-volunteering POLR providers numerically by MWhs served; and

(E) Assign ESI IDs in numerical order to non-volunteering POLR providers, in proportion to the percentage of MWhs served by each non-volunteering POLR provider to the total MWhs served by all non-volunteering POLR providers.

(4) For the purpose of calculating the POLR rate for each customer class in each POLR area, a POLR EFL shall be completed by the non-volunteering POLR provider that has the greatest market share in accordance with paragraph (2) of this subsection. The POLR EFL shall be supplied to commission staff electronically for placement on the commission webpage.

(5) Non-volunteering POLR providers may market to transitioned POLR customers to enroll the customers in competitive products or services in the same fashion and under the same conditions as described in subsection (i)(3) of this section.

(6) Upon a request from a non-volunteering POLR provider and a showing that the non-volunteering POLR provider will be unable to maintain its financial integrity if it is allocated additional POLR customers, the commission shall relieve a non-volunteering POLR provider from the allocation of any such additional customers. The commission shall provide at least ten business days' notice and an opportunity for hearing on the request for relief. The non-volunteering POLR provider shall continue providing POLR service until the commission issues an order relieving it of this responsibility. In the event the requesting non-volunteering POLR provider is relieved of its responsibility, the commission's designee may, with 90 days notice, designate the next eligible REP a non-volunteering POLR provider, based upon the criteria in paragraph (2) of this subsection.

(k) POLR rate.

(1) The provisions of this paragraph establish the maximum POLR rate of volunteer POLR REPs and non-volunteering POLR providers beginning with the 2007 - 2008 POLR term.

(A) The POLR rate for the residential customer class shall be determined by the following formula: POLR rate (in $ per kWh) = (Non-bypassable charges + POLR customer charge + POLR energy charge) / kWh used Where:

(i) Non-bypassable charges shall be all TDU and other non-bypassable charges and credits for the appropriate customer class in the applicable service territory, including ERCOT administrative charges, nodal fees or surcharges, replacement reserve charges attributable to POLR load, and applicable taxes from various taxing or regulatory authorities, multiplied by the level of kWh and KW used, where appropriate.

(ii) POLR customer charge shall be $0.06 per kWh.

(iii) POLR energy charge shall be the sum over the billing period of the actual hourly MCPEs for the customer multiplied by the level of kWh used, multiplied by 130%.

(iv) "Actual hourly MCPE" is an hourly rate based on a simple average of the actual interval MCPE prices over the hour.

(v) "Level of kWh used" is based either on interval data or on an allocation of the customer's total actual usage to the hour based on a ratio of the sum of the ERCOT backcasted profile interval usage data over the hour to the total of the ERCOT backcasted profile interval usage data over the customer's entire billing period.

(vi) For each billing period, if the sum over the billing period of the actual hourly MCPEs for a customer multiplied by the level of kWh used falls below the simple average of the zonal MCPE prices over the 12-month period ending September 1 of the preceding year multiplied by the total kWh used over the customer's billing period, then the POLR energy charge shall be the simple average of the zonal MCPE prices over the 12-month period ending September 1 of the preceding year multiplied by the total kWh used over the customer's billing period multiplied by 130%. This methodology shall apply until the commission issues an order suspending or modifying the operation of the floor after conducting an investigation.

(B) The POLR rate for the small and medium non-residential customer classes shall be determined by the following formula: POLR rate (in $ per kWh) = (Non-bypassable charges + POLR customer charge + POLR demand charge + POLR energy charge) / kWh used Where:

(i) Non-bypassable charges shall be all TDU and other non-bypassable charges and credits for the appropriate customer class in the applicable service territory, including ERCOT administrative charges, nodal fees or surcharges, replacement reserve charges attributable to POLR load, and applicable taxes from various taxing or regulatory authorities, multiplied by the level of kWh and KW used, where appropriate.

(ii) POLR customer charge shall be $0.025 per kWh.

(iii) POLR demand charge shall be $2.00 per kW, per month, for customers that have a demand meter, and $50.00 per month for customers that do not have a demand meter.

(iv) POLR energy charge shall be the sum over the billing period of the actual hourly MCPEs, for the customer multiplied by the level of kWh used, multiplied by 130%, multiplied by the level of kWh used.

(v) "Actual hourly MCPE" is an hourly rate based on a simple average of the actual interval MCPE prices over the hour.

(vi) "Level of kWh used" is based either on interval data or on an allocation of the customer's total actual usage to the hour based on a ratio of the sum of the ERCOT backcasted profile interval usage data over the hour to the total of the ERCOT backcasted profile interval usage data over the customer's entire billing period.

(vii) For each billing period, if the sum over the billing period of the actual hourly MCPEs for a customer multiplied by the level of kWh used falls below the simple average of the zonal MCPE prices over the 12-month period ending September 1 of the preceding year multiplied by the total kWh used over the customer's billing period, then the POLR energy charge shall be the simple average of the zonal MCPE prices over the 12-month period ending September 1 of the preceding year multiplied by the total kWh used over the customer's billing period multiplied by 130%. This methodology shall apply until the commission issues an order suspending or modifying the operation of the floor after conducting an investigation.

(C) The POLR rate for the large non-residential customer class shall be determined by the following formula: POLR rate (in $ per kWh) = (Non-bypassable charges + POLR customer charge + POLR demand charge + POLR energy charge) / kWh used Where:

(i) Non-bypassable charges shall be all TDU and other non-bypassable charges and credits for the appropriate customer class in the applicable service territory, including ERCOT administrative charges, nodal fees or surcharges, replacement reserve charges attributable to POLR load, and applicable taxes from various taxing or regulatory authorities, multiplied by the level of kWh and KW used, where appropriate.

(ii) POLR customer charge shall be $2,897.00 per month.

(iii) POLR demand charge shall be $6.00 per kW, per month.

(iv) POLR energy charge shall be the appropriate MCPE, determined on the basis of 15-minute intervals, for the customer multiplied by 130%, multiplied by the level of kWh used. The MCPE shall have a floor of $7.25 per MWh.

(2) If in response to a complaint or upon its own investigation, the commission determines that a POLR failed to charge the appropriate POLR rate, and as a result overcharged its customers, the POLR shall issue refunds to the specific customers who were overcharged.

(3) On a showing of good cause, the commission may permit the POLR to adjust the POLR rate, if necessary to ensure that the rate is sufficient to allow the POLR to recover its costs of providing service. Notwithstanding any other commission rule to the contrary, POLR rates may be adjusted on an interim basis for good cause shown and after at least ten business days notice and an opportunity for hearing on the request for interim relief. Any adjusted POLR rate shall be applicable to all POLR providers charging the POLR rate to the specific customer class, within the POLR area that is subject to the showing of good cause.

(4) Customer and demand charges associated with POLR service shall not be pro-rated for partial month usage if a customer switches away from the POLR to a REP of choice.

(l) Challenges to ESI ID assignments. A POLR is not obligated to serve an ESI ID within a customer class or a POLR area for which the POLR is not designated as a POLR, after a successful challenge of the ESI ID assignment. A POLR shall use the ERCOT market variance resolution tool to challenge a customer class assignment with the TDU. The TDU shall make the final determination based upon historical usage data and not premise type. If the customer class assignment is changed and a different POLR for the ESI ID is determined appropriate, the ESI ID will then be served by the appropriate POLR. Back dated transactions may be used to correct the POLR assignment.

(m) Limitation on liability. The POLRs will make reasonable provisions to provide POLR service to customers who request POLR service, or are transitioned to POLR service, individually or through a

mass transition; however, liabilities not excused by reason of force majeure or otherwise shall be limited to direct, actual damages. Neither the customer nor the POLR provider shall be liable to the other for consequential, incidental, punitive, exemplary, or indirect damages. These limitations apply without regard to the cause of any liability or damage. In no event shall ERCOT or a POLR be liable for damages to any REP, whether under tort, contract or any other legal theory of legal liability, for transitioning or attempting to transition a customer from such REP to the POLR for POLR service, or for marketing, offering or providing competitive retail electric service to a customer taking POLR service from the POLR or being transitioned to the POLR, in compliance with this title.

(n) Transition of customers to POLR service.

(1) POLR service for a requesting customer is initiated when the customer makes arrangements for POLR service, at the POLR rate, with any POLR authorized to serve the requesting customer's customer class within the requesting customer's POLR area. A POLR cannot refuse a customer's request to make arrangements for POLR service.

(2) A customer other than a residential customer or small commercial customer (as defined in §25.471(d) of this title (relating to General Provisions of Customer Protection Rules) may agree to a contract or terms of service that allow a REP to transfer the customer to a POLR for reasons other than non-payment, including the failure of the customer and its REP to agree on terms of renewal or extension of service. Unless ERCOT has a transaction that allows REPs to transfer such customers to the POLR, the POLR shall accept written requests for such transfers from REPs and shall initiate a switch for the customer to be transferred to the POLR. The acquisition by the POLR of such customers is not a prohibited enrollment under §25.474 of this title. As of January 1, 2007, this paragraph will expire and REPs will not be permitted to terminate customers to POLR for any reason except pursuant to a mass transition for the reasons described in subsection (n)(12) of this section.

(3) If a REP terminates service to a customer whose consumption is determined by monthly meter readings without giving notice, the POLR shall prorate the customer's usage based on the customer's historic data or load profile to establish the customer's charges for the relevant portion of the billing cycle, unless the customer requests and is willing to pay for an out-of-cycle meter read. Nothing in this section precludes a POLR from having an out-of-cycle meter read performed for a new customer on its own initiative provided the POLR does not pass on the cost of that meter read to the customer. As of January 1, 2007, this paragraph will expire and REPs will not be permitted to terminate customers to POLR for any reason except pursuant to a mass transition for the reasons described in subsection (n)(12) of this section.

(4) The POLR is responsible for obtaining resources and services needed to serve a customer once it has been notified that it is serving that customer. The customer is responsible for charges for POLR service at the POLR rate in effect at that time.

(5) If a REP terminates service to a customer, or transitions a customer to POLR, it is financially responsible for the resources and services used to serve the customer until it notifies the independent organization of the termination or transition of the service and the transfer to the POLR is complete.

(6) The POLR is financially responsible for all costs of providing electricity to customers from the time the transfer or initiation of service is complete until such time as the customer leaves POLR service.

(7) A REP whose customers are transitioned to POLRs shall return any unused portion of a transitioned customer's deposit within seven calendar days of receiving an actual or estimated meter read supplied by the TDU.

(8) ERCOT shall create a single standard file format and a standard set of customer billing contact data elements that in the event of a mass transition shall be used by the exiting REP and the POLRs to send and receive customer billing contact information. The process, as developed by ERCOT shall be tested on a periodic basis. All REPs shall submit timely, accurate, and complete files, as required by ERCOT in a mass transition event, as well as for the periodic tests. ERCOT shall retain the data from the last periodic test, to be used in lieu of data from the exiting REP, in instances where the exiting REP does not provide such data. ERCOT shall have the process utilizing the single standard file format designed and implemented as soon as possible, but no later than July 1, 2007. ERCOT shall revise the mass transition process so that customer transfers in a mass transition are initiated by ERCOT, rather than by a POLR, as soon as possible, but no later than July 1, 2007.

(9) When customers are to be transitioned to a POLR, the POLR may request usage and demand data from the appropriate TDU and from ERCOT, once the transition to the POLR provider has been initiated (either by the POLR provider or by ERCOT). Customer proprietary information provided to a POLR in accordance with this section shall be treated as confidential by the POLR and shall only be used for POLR related purposes.

(10) Information from the TDU and ERCOT to the POLRs shall be provided in Texas SET format. However, the TDU or ERCOT may supplement the information to the POLRs in other formats and fashions to expedite the transition to the POLRs. Such supplemental formats shall only be used in exceptional circumstances and at the option of the entity supplying the information. The transfer of information in accordance with this section will not constitute a violation of the customer protection rules that address confidentiality.

(11) A POLR may require a deposit from a customer that has been transitioned to the POLR to continue to serve the customer once the POLR has begun serving the customer. Despite the lack of a deposit, the POLR is obligated to serve the customer transitioned or assigned to it, beginning on the service initiation date of the transition or assignment, and continuing until such time as any disconnection request is effectuated by the TDU. A POLR may make the request for the deposit before the POLR begins serving the customer, but the POLR shall begin providing service to the customer even if the service initiation date is before the POLR receives the deposit, if any deposit is required, and shall not disconnect the customer until the appropriate time period to submit the deposit has elapsed. For the large non-residential customer class, a POLR may require a deposit to be provided in three calendar days. The POLR may waive the deposit requirement at the customer's request if deposits are waived in a non-discriminatory fashion. The POLR shall waive the deposit requirement for residential customers if the customer meets the qualifications listed in section 2. SECURITY AND BILLING, of the Standard Terms of Service.

(12) On the occurrence of one or more of the following events, ERCOT shall initiate a mass transition to the POLR providers, of all of the ESI IDs served by a REP, as of the date the mass transition is initiated.

(A) Termination of the Load Serving Entity (LSE) or Qualified Scheduling Entity (QSE) Agreement with ERCOT;

(B) Issuance of a commission Order declaring a REP in default of Tariff for Retail Delivery Service;

(C) Issuance of a commission Order de-certifying a REP;

(D) Issuance of a commission Order requiring a mass transition to POLR providers;

(E) Issuance of a judicial Order requiring a mass transition to POLR providers; and

(F) At the request of a REP, for the mass transition of all of that REP's ESI IDs (customers).

(13) A REP shall not use the mass transition process in this section as a means to eliminate non-profitable contracts, while retaining profitable contracts. A REP's use of the mass transition process may lead to de-certification of the REP.

(14) ERCOT may provide procedures for the mass transition process, consistent with this section.

(15) Until the process described in paragraph (8) of this subsection is complete, a REP whose ESI IDs are to be transitioned to POLRs shall provide the following information to the appropriate POLRs once the switch to the POLR has been initiated. In the event the exiting REP does not provide the required information, the TDUs shall promptly provide any relevant information in their possession with the understanding that the provided information may be out-dated, incomplete, or inaccurate. Providing the information to the POLRs under the conditions of a transition to POLRs shall not constitute a violation of Subchapter R of this chapter:

(A) REP's Data Universal Numbering System (DUNS) number;

(B) Customer's ESI ID number;

(C) Customer's account number with the REP that is losing the customer;

(D) Customer's name;

(E) Customer's telephone number;

(F) Customer's billing "care of" name; and

(G) Customer's billing address.

(16) A mass transition to POLR shall not override or supersede a switch request made by a customer to switch an ESI ID to a new REP of choice, that was made before a mass transition to POLR is initiated, unless the customer choice switch is scheduled for any date other than the next available switch date.

(17) A "move-in" transaction shall not be used to switch a customer's ESI ID to another REP when a "move-in" has not occurred except when the premise is de-energized or in extreme circumstances as authorized by commission designee.

(18) All mass transition event timelines shall be based upon calendar days if not specifically stated as such, unless specifically stated otherwise.

(19) In the event of a transition to a POLR or away from a POLR to a REP of choice, the switch notification notice detailed in §25.474(l) of this title is not required.

(20) In a mass transition event, the ERCOT initiated transactions shall request an out-of-cycle meter read for the associated ESI IDs, for a date two calendar days after the calendar date ERCOT initiates such transactions to the TDU. If an ESI ID does not have the capability to be read in a fashion other than a physical meter read, the out-of-cycle meter read may be estimated. An estimated meter read for the purpose of a mass transition to POLR shall not be considered a break in a series of consecutive months of estimates, but shall not be considered a month in a series of consecutive estimates performed by the TDU. An out-of-cycle meter read or estimate for the purpose of a mass transition shall be charged to the exiting competitive REP.

(o) Termination of POLR status.

(1) The commission may revoke a REP's POLR status after notice and opportunity for hearing:

(A) If the POLR fails to maintain REP certification;

(B) If the POLR fails to provide service in a manner consistent with this section;

(C) For good cause, provided the commission affords the POLR due process; or

(D) The POLR fails to maintain appropriate financial qualifications.

(2) If a non-volunteering POLR provider defaults or has its status revoked before the end of its term, after a review of the eligibility criteria, the next eligible REP will assume the duties of the former POLR, consistent with subsection (j)(6) of this section.

(3) The provisions of this paragraph address the transition to a new POLR at the end of a POLR term.

(A) At the end of the POLR term the outgoing POLR may chose either to continue to serve POLR customers who do not select another provider through a competitive product or service provided by the outgoing POLR or a REP affiliated with the outgoing POLR or to transfer the customers who do not select another provider to the incoming POLR on the first meter read date after the term of the incoming POLR commences.

(B) A notice containing the information specified in either subparagraph (C) or (D) of this paragraph, as applicable, shall be provided to each POLR customer at least 60 calendar days prior to the end of the POLR term. The notice shall be in type no smaller than 12 points in size. The notice shall satisfy the requirements of §25.493(b) of this title (relating to Acquisition and Transfer of Customers from one Retail Electric Provider to Another). The notice shall also include a phone number for the outgoing POLR for the customer to call to obtain more information.

(C) The notice provided by a POLR that elects to transfer customers who fail to switch to another provider, to a competitive product or service provided by the outgoing POLR or a REP affiliated with the outgoing POLR, shall include a description of the POLR pricing mechanism for the appropriate customer class and service area and a statement that the POLR price is generally higher than available competitive prices, that the POLR price is unpredictable, and that the exact POLR rate for each billing period will not be determined until the time the bill is prepared, and the competitive product or service rate offered by the outgoing POLR or a REP affiliated with the outgoing POLR. The notice shall specify the deposit requirements of the outgoing POLR or REP affiliated with the outgoing POLR and shall state that other providers may also require a deposit and may require payment of any amounts owed the provider for services previously rendered. The notice shall state where the customer may find additional information about offerings of other providers and shall inform the customer that, if the customer does not select another provider or request service from the incoming POLR by a specified date, that a competitive affiliate of the outgoing POLR will continue to serve the customer at the rate specified in the notice.

(D) If the POLR elects to transfer customers who do not select another provider, to the incoming POLR on the first meter read

date after the term of the incoming POLR commences, the notice to customers shall state where the customer can find more information about other offerings as well as the rates of the incoming POLR. The notice shall include a description of the POLR pricing mechanism for the appropriate customer class and service area and a statement that the POLR price is generally higher than available competitive prices, that the POLR price is unpredictable, and that the exact POLR rate for each billing period will not be determined until the time the bill is prepared. The notice shall also inform the customer that, if the customer does not select another provider by a specified date, the customer will be transferred to the incoming POLR on the first meter read date after the commencement of the POLR term. The notice shall also inform the customer that the incoming POLR will bill the customer for a deposit and that the deposit can be made in two installments as will be described further in the notice from the incoming POLR.

(E) If a POLR customer either requests service from the incoming POLR or is terminated to the incoming POLR by the outgoing POLR, the outgoing POLR shall offset the customer's final bill against the customer's deposit and refund any remaining balance to the customer within seven calendar days from the customer's final meter read date. The customer shall be entitled to pay the deposit required by the incoming POLR in two installments in the manner provided in §25.478(e)(3) of this title (relating to Credit Requirements and Deposits).

(p) Electric cooperative delegation of authority. An electric cooperative that has adopted customer choice may propose to delegate to the commission its authority to select POLR providers under PURA §41.053(c) in its certificated service area in accordance with this section. After notice and opportunity for comment, the commission will, at its option, accept or reject such delegation of authority. If the commission accepts the delegation of authority, the following conditions will apply:

(1) The board of directors will provide the commission with a copy of a board resolution authorizing such delegation of authority;

(2) The delegation of authority will be made at least 30 calendar days prior to the time the commission issues a publication of notice of eligibility;

(3) The delegation of authority will be for a minimum period corresponding to the period for which the solicitation will be made;

(4) The electric cooperative wishing to delegate its authority to designate a POLR will also provide the commission with the authority to apply the selection criteria and procedures described in this section in selecting the POLR providers within the electric cooperative's certificated service area; and

(5) If there are no competitive REPs offering service in the electric cooperative certificated area, the commission will automatically reject the delegation of authority.

(q) Reporting requirements. Each POLR shall file, and affiliated REPs serving nonpaying customers of competitive REPs shall file the following information with the commission on a quarterly basis beginning January of each year in a project established by the commission for the receipt of such information. Each quarterly report shall be filed within 30 calendar days of the end of the quarter. Except as provided in paragraph (5) of this subsection, information filed by an affiliated REP in accordance with paragraph (1) of this subsection will be made publicly available by the commission on an aggregated basis. Except as provided in paragraph (5) of this subsection, information filed by a POLR in accordance with paragraphs (2) - (4) of this subsection will be made publicly available by the commission for each POLR area. After the report applicable to data for the fourth quarter of 2006 is filed, the requirements of this subsection that are applicable to the affiliated REP serving non-paying customers of competitive REPs will expire.

(1) For each month of the reporting quarter, the affiliated REP shall report:

(A) The number of residential customers who were disconnected for non-payment and the number of those customers that were eligible for the rate reduction program under §25.454 of this title;

(B) The number of residential customers who were transferred to the affiliated REP by a competitive REP for non-payment and the number of those customers that were eligible for the rate reduction program under §25.454 of this title;

(C) The average amount owed to the affiliated REP by residential customers at the time of disconnection;

(D) The average amount owed to the affiliated REP by residential customers eligible for the rate reduction program at the time of disconnection;

(E) The number of small non-residential customers who were disconnected for non-payment; and

(F) The average amount owed to the affiliated REP by small non-residential customers at the time of disconnection.

(2) For each month of the reporting quarter, each POLR shall report the total number of new customers acquired by the POLR and the following information regarding these customers:

(A) The number of customers eligible for the rate reduction program pursuant to §25.454 of this title;

(B) The number of customers from whom a deposit was requested pursuant to the provisions of §25.478 of this title, and the average amount of deposit requested;

(C) The number of customers from whom a deposit was received, including those who entered into deferred payment plans for the deposit, and the average amount of the deposit;

(D) The number of customers whose service was physically disconnected pursuant to the provisions of §25.483 of this title (relating to Disconnection of Service) for failure to pay a required deposit; and

(E) Any explanatory data or narrative necessary to account for customers that were not included in either subparagraph (C) or (D) of this paragraph.

(3) For each month of the reporting quarter each POLR shall report the total number of customers to whom a disconnection notice was issued pursuant to the provisions of §25.483 of this title and the following information regarding those customers:

(A) The number of customers eligible for the rate reduction program pursuant to §25.454 of this title;

(B) The number of customers who entered into a deferred payment plan, as defined by §25.480(j) of this title (relating to Bill Payment and Adjustments) with the POLR;

(C) The number of customers whose service was physically disconnected pursuant to §25.483 of this title;

(D) The average amount owed to the POLR by each disconnected customer at the time of disconnection; and

(E) Any explanatory data or narrative necessary to account for customers that are not included in either subparagraph (B) or (C) of this paragraph.

(4) For the entirety of the reporting quarter, each POLR shall report, for each ESI ID that received POLR service, the TDU and POLR customer class associated with the ESI ID, the number of days the ESI ID received POLR service, and whether the ESI ID is currently a POLR customer.

(5) Reports filed under this subsection are subject to release as public information unless the reports or specific parts of the reports can be shown to be exempt from disclosure under Chapter 552 of the Texas Government Code, commonly known as the Texas Public Information Act (TPIA). If a reporting entity contends that all or part of a report is confidential, then the reporting entity shall file the information in accordance with the requirements of §22.71(d) of this title. The reporting entity must submit in writing specific detailed reasons, including relevant legal authority, in support of its contentions that the material is exempt from disclosure under the TPIA. All reports and parts of reports that are not marked as confidential will be automatically considered public information upon submittal. The validity of any claim of confidentiality may be determined by the commission through a contested case proceeding, by the Office of the Attorney General pursuant to the provisions of the TPIA, or both.

(r) Notice of Transition to POLR Service. When a customer is moved to POLR service the customer will be provided notice of the transition by the REP transitioning the customer as well as by the POLR. Notice shall be provided as soon as the transitioning REP knows the customer will be transitioned to POLR service and as soon as the POLR has the customer contact information. The notice of transition to POLR service shall include, at a minimum the following items:

(1) Notice by the REP transitioning the customer:

(A) The reason for the transition to POLR service;

(B) A contact number for the REP;

(C) A statement that the customer will receive a separate notice from the POLR that will disclose the date the POLR will begin serving the customer;

(D) A description of how and when any unused customer deposit will be returned to the customer;

(E) A description of the POLR pricing mechanism for the appropriate customer class and service territory and a statement that the POLR price is generally higher than available competitive prices, that the POLR price is unpredictable, and that the exact POLR rate for each billing period will not be determined until the time the bill is prepared;

(F) A statement that the customer can leave POLR service by choosing a competitive product or service offered by the POLR, a REP affiliated with the POLR, or another competitive REP, as well as the following statement: "If you would like to choose a different retail electric provider, please access www.powertochoose.org, or call toll-free 1-866-PWR-4-TEX (1-866-797-4839) for a list of providers in your area;"

(G) For residential customers, notice from the commission in the form of a bill insert or a bill message with the header "A Message from the Public Utility Commission" addressing why the customer has been transitioned to POLR, the continuity of service purpose and temporary nature of POLR service, the need to choose a competitive provider, and information on competitive markets to be found at www.powertochoose.org, or toll-free at 1-866-PWR-4-TEX (1-866-797- 4839);

(H) If applicable, a description of the activities that the REP will use to collect any outstanding payments, including the use of consumer reporting agencies, debt collection agencies, small claims court, and other remedies allowed by law, if the customer does not pay or make acceptable payment arrangements with the REP; and

(I) Notice to the customer that after being transitioned to POLR service, the customer may accelerate a switch to another REP by requesting a "special or out-of-cycle meter read" and that applicable transmission and distribution utility charges for the meter read will be charged to the gaining REP, which may pass the charge on to you as a customer.

(2) Notice by the POLR:

(A) The date the POLR will begin serving the customer and a contact number for the POLR;

(B) A description of the POLR pricing mechanism for the appropriate customer class and service area and a statement that the POLR price is generally higher than available competitive prices, that the POLR price is unpredictable, and that the exact POLR rate for each billing period will not be determined until the time the bill is prepared;

(C) The deposit requirements of the customer and any applicable deposit waiver provisions and a statement that, if the customer chooses a competitive product or service offered by the POLR, a REP affiliated with the POLR, or another competitive REP, a deposit may be required;

(D) A statement that the competitive products or services may be available through the POLR, a REP affiliated with the POLR, or another competitive REP, and the customer can leave POLR service by choosing a competitive product or service offered by the POLR, a REP affiliated with the POLR, or another competitive REP, as well as the following statement: "If you would like to choose a different retail electric provider, please access www.powertochoose.org, or call toll-free 1-866-PWR-4-TEX (1-866-797-4839) for a list of providers in your area;"

(E) The applicable POLR Standard Terms of Service;

(F) The applicable disconnection procedures;

(G) Notice to the customer that after being transitioned to POLR service, the customer may accelerate a switch to another REP by requesting a "special or out-of-cycle meter read" and that the applicable transmission and distribution utility charge for the meter read will be charged to the gaining REP, which may pass the charge on to you as the customer;

(H) Notice that after enrolling in a non-POLR, competitive product or service, the customer shall no longer be considered a POLR customer; and

(I) For residential customers, with each bill from the POLR, notice from the commission in the form of a bill insert or a bill message with the header "A Message from the Public Utility Commission" addressing why the customer has been transitioned to POLR, the continuity of service purpose and temporary nature of POLR service, the need to choose a competitive provider, and information on competitive markets to be found at www.powertochoose.org or toll-free 1-866-PWR-4-TEX (1-866-797-4839).

(s) Disconnection by POLR. The POLR must comply with the applicable customer protection rules as provided for under Subchapter R of this chapter except as otherwise stated in this section. To ensure continuity of service, POLR service shall begin when the ESI ID transition to the POLR is complete. A customer deposit is not a prerequisite for the initiation of POLR service. Once POLR service has been initiated, a customer deposit may be required to prevent disconnection. Disconnection for failure to pay a deposit may not occur until after the proper notice and after that appropriate payment period detailed in

§25.478 of this title, has elapsed, except where otherwise noted in this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 75. AIR CONDITIONING AND REFRIGERATION CONTRACTORS

16 TAC §§75.10, 75.20 - 75.24, 75.26, 75.30, 75.40, 75.65, 75.70, 75.71, 75.80, 75.90, 75.100

The Texas Commission of Licensing and Regulation ("Commission") adopts amendments to existing rules at 16 Texas Administrative Code, §§75.10, 75.20 - 75.24, 75.26, 75.30, 75.40, 75.65, 75.80, 75.90, and 75.100, regarding the air conditioning and refrigeration contractor program as published in the April 7, 2006, issue of the *Texas Register* (31 TexReg 2963), without changes and will not be republished.

The Texas Commission of Licensing and Regulation ("Commission") also adopts amendments to an existing rule at 16 Texas Administrative Code, §75.70 and new §75.71, regarding the air conditioning and refrigeration contractor program as published in the April 7, 2006, issue of the *Texas Register* (31 TexReg 2963), with changes and will be republished.

The rule changes were identified during a periodic rule review process as required by statute and they are necessary to update statutory references and to conform rule requirements to current law. In addition, the rule changes are needed to reorganize certain provisions for greater clarity and readability and to delete unnecessary provisions. An explanation of each change made to the rules is set out below.

Rule 75.10 is amended in several areas to clarify language and to remove unnecessary provisions and words. In the definition of "business affiliation" the words "or her" are deleted to avoid use of "his or her". In the definition of "contracting" "verbally" is changed to "orally", and relocated to clarify the language. The definition of "direct supervision" is reworded for better flow of language by replacing "for compliance with", with, "to assure". In addition, the first words of subsection were made lower case to be consistent with other sections of these rules. The definition of "filed" is deleted, as that definition should be in the agency's general rules. In the definition of "full time employee" the word "either" is added to make it clear that there are two ways for employees of a contracting company to be considered as full time employees.

Rule 75.20. Licensing Requirements--Application and Experience Requirements. In subsection (b)(3) the reference to the Coordinating Board of Texas College and University System is changed to the Texas Higher Education Coordinating Board. Subsection (c) is deleted because a section addressing administrative penalties is included in the agency's general rules.

Rule 75.21. Licensing Requirements--Examinations. Subsections (b) and (c) are deleted since they are not licensing requirements, but are procedural matters that are addressed on the application forms for licensure. In subsection (d), the phrase, "has been" is replaced with "is" for clarification.

Rule 75.22. General License Provisions. Subsection (a) is deleted as the prohibition against a contracting company using a license that is not assigned to it, is included in new §75.71. Subsection (b) provides that a license, rather than a license number, is not transferable. Paragraphs (1) and (2) were added to include the requirements set out in the old subsection (d) that has been deleted. In subsection (d), "either" was replaced by "an" "and the word "two" by "combined", to clarify the language. In subsection (e), language is clarified and provides that two different license numbers will be issued on one card and will expire concurrently. Subsection (k) is deleted as the prohibition against altering a license and is moved to §70.71. The provision regarding the responsibility of licensees in subsection (i) is deleted as it is addressed in §75.70. Subsection (m) is deleted since it no longer reflects procedures of the agency. Today credit card type licenses are issued to all licensees.

Rule 75.23. Licensing Requirements--Temporary Licenses. In subsection (c), the reference to ten business days is changed to thirty days to make timelines set out in these rules consistent with timelines used in other programs administered by the agency. In subsection (e), the phrase, "temporary method" was replaced with "other temporary methods" to clarify the language. The provision in subsection (f) allowing the Executive Director to waive any requirement for issuance of a temporary license is deleted.

Rule 75.24. Licensing Requirements--Renewal. In subsection (a) "request" is changed to "application" and the phrase "if any" is added to the end of subsection (a)(2) to make it clear that a licensee may work for a company without assigning his license. In subsection (b), language is added to reference the Administrative Procedure Act.

Rule 75.26. Sale and Use of Refrigerants--Certificate of Registration. The title is amended to refer to the sale and use of refrigerants. Subsection (a) is amended by adding the word "application" before the word "fee" to clarify the type of fee. In subsection (b), "Persons" is changed to "Registrants" since statute defines person as an individual.

Rule 75.30. Exemptions. The exemption in subsection (a)(4) is deleted, as it is not provided for in statute.

Rule 75.40. Insurance Requirements. Subsection (c) is amended to clarify that insurance companies that provide insurance to licensees must be authorized by the Texas Insurance Code to sell insurance, to make this provision consistent with the Texas Insurance Code. In subsection (d) a requirement is added that licensees must file a new insurance certificate when changing an affiliation. Subsection (h) is deleted and moved to §75.70(i).

Rule 75.65. Advisory Board. In subsection (a), "Executive Director" is changed to "Commission" as the board is charged by

statute with the duty to advise the Commission. Subsection (b) is deleted since the Executive Director interacts directly with the board. Subsection (c) is deleted since the statute at §1302.208 provides that the presiding officer calls meetings.

Rule 75.70. Responsibilities of the Licensee. The section title is amended by deleting the reference to air conditioning and refrigeration contracting companies. The rule is also amended by deleting references to contracting companies as those matters are addressed in new §75.71. In subsection (a)(1) the phrase, "a business" is replaced by "an air conditioning and refrigeration contracting company" and "or her" is deleted to make this section consistent with other sections of these rules. In subsection (a)(2), "a bona fide" is replaced by "an". The deleted phrase adds very little to the rule and may cause confusion without an added definition of the term. In subsection (a)(4), "or her" is deleted and "air conditioning and refrigeration contracting" is added before the word "company", and "through which the licensee provides services" is added to make it clear that a licensee may work for a contracting company without assigning his license to the company. Subsections (a)(5) and (b)(1) - (6) are deleted and moved to §75.71. Subsection (a)(5) is amended to make it clear that licensees, whether or not they are supervising licensees, are responsible for their work. Language is added to subsection (a)(6) to make it clear that only licensees who have supervisory responsibility for a contracting company have certain responsibilities. Subsection (a)(7) is amended by adding "assure the" before "mechanical integrity" and adding the phrase "of work and installations performed or supervised by the licensee". New subsection (a)(10) is added since the enforcement authority is primarily effective with licensees. If a licensee may lose his license for knowingly working for a company that does not comply with the rules, this may put some pressure on companies to comply. Subsections (g), (i), and (k) - (n) are deleted and moved to §75.71. Subsection (f) is amended to prohibit a licensee from allowing another person to use his license. Subsection (g) is added to state separately from §75.70(f) that a licensee may not allow a company to use his license if the licensee is not affiliated with the company. In subsection (h)(1) the ten day notice requirement is changed to thirty days to be consistent with timelines used in other agency programs. In subsection (h)(2) the ten day notice requirement changed to thirty days, and the requirement to report an address change was dropped since that requirement is set out in §75.70(h)(1). Subsection (i) is new to this rule as it was moved from §75.40(h). Subsection (j) is new to this rule as it was moved from §75.22(k).

Rule 75.71. Responsibilities of the Air Conditioning and Refrigeration Contracting Company. Provisions concerning contracting companies deleted from §75.70 are found in this new rule. No substantive changes were made.

In §75.80, the application and license fees are combined into a single fee. In subsection (f) the word "application" is added to make it clear that the fee is for the application rather than for the Certificate of Registration.

In §75.90 the words "or entity" are added to make it clear that individuals and organizations may be sanctioned for violations of the statute and the rules.

Rule 75.100. Technical Requirements. The reference to the National Electric Code is changed from "current" to "applicable". In subsection (d), the word "work" is added to clarify the language.

The Department drafted and distributed the proposed rules to persons internal and external to the agency and received one comment from an individual in the air conditioning and refrigeration business.

The individual, in writing, expressed concern that the language of proposed §75.70(a)(10) is vague in that licensees may not know if a contracting company is fully compliant with the statute and rules. The Commission agreed that the language of the proposed rule was unclear and could be interpreted to impose an unnecessary burden on licensees.

The proposed language reads, "(10) not knowingly provide air conditioning and refrigeration work for or on behalf of an air conditioning and refrigeration contracting company that does not fully comply with the requirements of Occupations Code, Chapter 1302 and with these rules." The adopted language reads, "(10) not knowingly provide air conditioning and refrigeration work for or on behalf of an unlicensed air conditioning and refrigeration contracting company, or a contracting company that does not have an affiliation with a licensed individual who supervises all air conditioning and refrigeration work as provided by Occupations Code, Chapter 1302 and these rules." No other oral or written comments were received.

The amendments and the new rule are adopted under the authority set forth in Texas Occupations Code, Chapters 51 and 1302, which authorize the Commission to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department.

The statutory provisions affected by this adoption are those set forth in Texas Occupations Code, Chapters 51 and 1302. No other statutes, articles, or codes are affected by the adoption of these rules.

§75.70. Responsibilities of the Licensee.

(a) The licensee shall:

(1) if affiliated with an air conditioning and refrigeration contracting company, assign his license to one company or one permanent office of the company that will use the license;

(2) if affiliated with an air conditioning and refrigeration contracting company, be an employee or owner of the air conditioning and refrigeration contracting company and must work full time at the company or permanent office of the company;

(3) use his license for one business affiliation and one permanent office at any one given time;

(4) furnish the Department with his permanent mailing address and the name, physical address, and telephone number of the air conditioning and refrigeration contracting company through which the licensee provides services;

(5) verify that all work for which he has supervisory responsibility is performed so that mechanical integrity of installed products, system or equipment is maintained, and that all maintenance, service, and repair work has been done properly; and

(6) if affiliated with an air conditioning and refrigeration contracting company, furnish to municipalities a list of authorized agents that may pull permits under the license, and, if subcontracting jobs to other licensed air conditioning and refrigeration contracting companies, furnish a list of agents of those licensed companies that may pull permits under his license.

(7) provide proper installation and service, and assure the mechanical integrity of work and installations performed or supervised by the licensee;

(8) not misrepresent the need for services, services to be provided, or services that have been provided;

(9) not make a fraudulent promise or false statement to influence, persuade, or induce an individual or a company to contract for services; and

(10) not knowingly provide air conditioning and refrigeration work for or on behalf of an unlicensed air conditioning and refrigeration contracting company, or a contracting company that does not have an affiliation with a licensed individual who supervises all air conditioning and refrigeration work as provided by Occupations Code, Chapter 1302, and these rules.

(b) A licensee may subcontract portions of work requiring a license under the Act to unlicensed persons, firms, or corporations as long as:

(1) the licensee actively provides work or service which requires a license, either in person or with the licensee's employees;

(2) the work or service provided in person or with the licensee's employees consists of more than accepting a contract or request for service, scheduling the work, and providing supervision of the work; and

(3) the licensee is ultimately responsible to the customer for all work performed by the subcontractor.

(c) The design of a system may not be subcontracted to an unlicensed person, firm or corporation.

(d) A licensee who subcontracts to perform work requiring a license under the Act for an air conditioning and refrigeration contracting company is responsible to the company and the department for the mechanical integrity of all work performed by the subcontractor.

(e) The licensee is responsible for all work performed under his supervision, regardless of whether the owners, officers, or managers of the air conditioning and refrigeration contracting company allow the licensee the authority to supervise, train, or otherwise control compliance with the Act.

(f) A licensee shall not allow another individual to use his license for any purpose.

(g) A licensee shall not allow any air conditioning and refrigeration contracting company with which he has no business affiliation to use his license for any purpose, except as otherwise allowed by these rules.

(h) A licensee shall:

(1) notify the Department, in writing, within thirty days of any change in permanent mailing address, company location, company telephone number or change in assignment of license; and

(2) provide a revised insurance certificate to the Department within thirty days of a change in the name of the company to which the license is assigned.

(i) Failure to maintain insurance or failure to provide a certificate of insurance when requested is grounds for imposition of administrative penalties and/or sanctions.

(j) Altering a license in any way is prohibited and is grounds for imposition of administrative penalties and/or sanctions.

§75.71. Responsibilities of the Air Conditioning and Refrigeration Contracting Company.

(a) An Air Conditioning and Refrigeration Contracting Company shall:

(1) notify the Department of all licensees who have assigned their licenses to the company, and shall notify the Department within thirty business days when any licensee whose license is assigned to the company has left its employ;

(2) furnish to the Department copies of applicable assumed name registrations from the Secretary of State and/or County Clerks' office;

(3) maintain records on its license holder showing payroll taxes deducted and reported to the Texas Workforce Commission, and either, hours worked each day or documentation showing that the licensee is on salary and works full time for the contracting company;

(4) furnish a copy of the company's records, specified in paragraph (3) of this subsection, at the request of the Department;

(5) furnish to municipalities a list of authorized agents that may pull permits under the license of its license holder, and, if subcontracting jobs to other licensed air conditioning and refrigeration contracting companies, furnish a list of agents of those licensed companies that may pull permits under the license of its license holder; and

(6) make available to the Department in Austin, Texas, or other location designated by the Department, the records relating to the business of the air conditioning and refrigeration contracting company conducted through a permanent office for a period of at least three years after completion of a job.

(b) A person or an air conditioning and refrigeration contracting company that performs air conditioning and refrigeration contracting shall:

(1) provide proper installation and service, and assure the mechanical integrity of all work and installations;

(2) not misrepresent the need for services, services to be provided, or services that have been provided; and

(3) not make a fraudulent promise or false statement to influence, persuade, or induce an individual or a company to contract for services.

(c) A contracting company may subcontract portions of work requiring a license to unlicensed persons, firms, or corporations as long as:

(1) the contracting company's employees, working under the supervision of the contracting company's assigned licensee actively provides work or service;

(2) the work or service provided by the employees consists of more than accepting a contract or request for service, scheduling the work, and providing supervision of the work; and

(3) the assigned licensee is ultimately responsible to the customer for all work performed by the subcontractor.

(d) The design of a system shall not be subcontracted to an unlicensed person, firm or corporation.

(e) Each air conditioning and refrigeration contracting company shall have a licensee employed full time for each permanent office. All work requiring a license shall be under the direct supervision of the licensee for that office.

(f) If an air conditioning and refrigeration contracting company uses locations other than a permanent office, those locations shall be used only for air conditioning and refrigeration workers to receive instructions from the permanent office on scheduling of work, to store parts and supplies, and/or to park vehicles. These locations may not be used to contract air conditioning sales or service.

(g) Each air conditioning and refrigeration contracting company shall display the license number of its affiliated licensee and company name in letters not less than two inches high on both sides of all vehicles used in conjunction with air conditioning and refrigeration contracting. When an unlicensed subcontractor is at a job site not identified by a marked vehicle, the site shall be identified either by a temporary sign on the subcontractor's vehicle or on a sign visible and readable from the nearest public street containing the contractor's affiliated license number and company name.

(h) All advertising by air conditioning and refrigeration contracting companies designed to solicit air conditioning or refrigeration business shall include the affiliated licensee's license number. The following advertising does not require the license number:

(1) nationally placed television advertising, in which a statement indicating that license numbers are available upon request is used in lieu of the licensee's license number;

(2) telephone book listings that contain only the name, address, and telephone number;

(3) manufacturers' and distributor's telephone book trade ads endorsing an air conditioning and refrigeration contractor;

(4) telephone solicitations, provided the solicitor states that the company complies with licensing requirements of the state. The affiliated licensee's number must be provided upon request;

(5) promotional items of nominal value such as ball caps, tee shirts, and other gifts;

(6) letterheads and printed forms for office use; and

(7) signs located on the contractor's permanent business location.

(i) An invoice shall be provided to the consumer for all air conditioning and refrigeration work performed. The company name, address, and phone number shall appear on all proposals and invoices. The affiliated licensee's number shall appear on all proposals and invoices for air conditioning and refrigeration work. The following information: "Regulated by The Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, 1-800-803-9202, 512-463-6599" shall be listed on:

(1) proposals and invoices;

(2) written contracts; and

(3) a sign prominently displayed in the place of business if the consumer or service recipient may visit the place of business for service.

(j) An air conditioning and refrigeration contracting company shall not use a license that is not assigned to that company.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 82. BARBERS

The Texas Commission of Licensing and Regulation ("Commission") adopts amendments to existing rules at 16 Texas Administrative Code, §§82.10, 82.20, 82.21, 82.26, 82.50, 82.51, 82.53, 82.70, 82.71 - 82.73, 82.80, 82.100 - 82.102, 82.104, 82.106 - 82.108, 82.114, and 82.120, new rule §82.74, and the repeal of §82.32, regarding the barber program. Sections 82.72 - 82.74, and 82.120 are adopted with changes to the text as published in the April 14, 2006, issue of the *Texas Register* (31 TexReg 3144). Sections 82.10, 82.20, 82.21, 82.26, 82.50, 82.51, 82.53, 82.70, 82.71, 82.80, 82.100 - 82.102, 82.104, 82.106 - 82.108, 82.114, 82.120 and the repeal of §82.32 are adopted without changes and will not be republished.

These new, amended, and repealed rules are necessary to implement provisions of Senate Bill 411, 79th Legislature, Regular Session. Senate Bill 411 abolished the Texas State Board of Barber Examiners and transferred the licensing and regulation of barbering to the Texas Department of Licensing and Regulation ("Department"). These rules are part of a third phase of rulemaking to implement the transfer of the barber program to the Department. The first and second phases of Department rules concerning the barber program became effective on December 8, 2005 and March 1, 2006, respectively. This third phase of rule changes reorganizes provisions for greater clarity and readability, simplifies definitions, and updates rule requirements, particularly reporting requirements for barber schools and curriculum requirements for obtaining barber licenses. In addition, minor wording changes are made to various section headings and throughout the rules for greater consistency or to make typographical and technical corrections.

The Advisory Board on Barbering ("Board"), which is the body charged with advising the Commission on the barber program, recommended these rules for adoption. The Department received comments on the proposed rules from two individuals or associations. The rules are adopted with certain changes from the rules as proposed. These changes are based primarily on public comments and were recommended by the Board.

The proposed rules were published in the *Texas Register* on April 14, 2006, and the comments period closed on May 15, 2006.

Section 82.10 is amended to update definitions for better clarity and to conform to current law. In the definition of "beard" the phrase has been deleted that a beard shall only be trimmed, shaped or cut by a licensed barber. The primary reason for this change is that this part of the definition is no longer consistent with the definition of "cosmetology" in Texas Occupations Code, §1602.002, which allows a licensed cosmetologist to treat a person's beard or mustache by arranging, beautifying, coloring, processing, styling, or trimming. However, a cosmetologist may not shave a beard or mustache. Another reason for the change is that a definition is not the appropriate place to state a substantive prohibition on conduct.

Section 82.10 is also amended to add the word "horizontal" to the definition of "line of demarcation between 'the hair' and 'the beard'" for clarity. The definition of "sideburn" is reworded for clarity. In addition, the sentence stating that only a licensed barber shall trim, shape or cut the sideburns with any type of razor is deleted. This portion of the definition appears to be inconsistent with the statutory definition of "cosmetology," which allows a licensed cosmetologist to trim, shape or cut hair and mustaches or beards. The statutory definitions of "cosmetology" and "barbering" already prescribe that only a barber, and not a cosme-

tologist, may for compensation shave a person's beard or mustache.

Section 82.21(b) is amended to delete the word "teacher" because this provision does not in fact apply to a barber teacher. The teacher curriculum is only 1,000 hours, so a teacher cannot take advantage of the early examination provision. Subsection (f) is amended to add that the Department may require parental approval for practical examination models under 18 years of age. This provision is necessary because the minimum age of a model was lowered to 16 in a previous rulemaking. The Department needs the ability to ensure that a minor has parental consent to participate in a Department examination as a model. Subsection (i) is amended to simplify the language of that subsection and delete unnecessary words.

Section 82.32 is repealed because the substance of that section is incorporated into new §82.74.

Section 82.50(b) is amended to clarify that, with the exception of initial inspections, the Department may conduct inspections of barber establishments without advance notice. Section 82.51 is amended to clarify that the inspections referred to are "initial" inspections that occur before operation of an establishment, when an establishment relocates, or when a school changes ownership.

Section 82.70(a) is amended to add barbershop and manicurist specialty shop to the list of licensees that may advertise in the yellow pages under "Barber." In addition, the text of subsection (b) is deleted. No one is required to take a barber refresher course, and the Department believes that it is unnecessary to prohibit a barber who is enrolled in a refresher course from being employed by or serving as the manager or instructor of a school.

New language is added to §82.71(g) to require, for the use of individuals who work in the shop, that a shop provide at least one sink, wash basin, or hand sanitizer for every three chairs. This requirement is similar to language that was in the rules prior to changes in sanitation provisions effective March 1, 2006. Licensees are required to wash their hands or use a liquid hand sanitizer in between each client, and the Department believes that it is necessary also to require shops to have adequate facilities for doing so. The new language of subsection (h) is identical to provisions in §82.70 and §82.72, specifying who may advertise in the yellow pages under "Barber." The new language of subsection (k) requires an establishment to display, in a conspicuous place clearly visible to the public, a copy of the establishment's most recent Department inspection report. This requirement is necessary to keep public patrons of the establishment informed of the establishment's inspection results. Other changes to the section are minor wording changes for consistency.

Section 82.72 is amended to delete the optional student kit equipment from subsection (h). The Department believes it is unnecessary to list optional equipment in the rule, only equipment that is required. Deletion of this language should not have an effect on current school practices. In subsection (m) minor technical revisions are made, the obsolete word "photostatic" is deleted, and the requirement is deleted to submit two photographs of the student with a student permit application. The photographs are not needed with the application because the Department requires a government-issued photo identification for an examinee to gain entrance to an examination, and the amendment in subsection (n) would require a school to affix student photographs to the student permit. New language in Subsection (n) is relocated from §82.73, with modifications regarding the school affixing student photographs to the permit. The adopted rule is changed from the proposed version of the rule based on a public comment from O. G.'s School of Hair Design. The commenter wishes to retain the current requirement of displaying a student permit at the student's station as a teaching tool for students. The adopted rule requires the school to affix two photographs furnished by the student, one affixed to the student's portion of the permit and the other affixed to the school's portion of the permit. A corresponding change in §82.73(b) requires the student to display the student's portion of the permit at or near the student's work station. Section 82.72(o), similar to the proposed version of the rule, requires a barber school to maintain an album displaying the school's portion of student permits. Subsection (r) of §82.72 is amended to conform to provisions in §82.70 and §82.71 concerning licensee advertising in the yellow pages under "Barber."

New subsection (y) of §82.72 has been changed from the rule as proposed based on a public comment from O. G.'s School of Hair Design. The adopted rule requires a school at least one time per month to submit an electronic record of each student's accrued hours to the Department in a manner and format prescribed by the Department. The Department believes that electronic reporting of student hours is necessary for the efficient administration of the barber program; however, to address the commenter's concerns, the time frame for reporting is increased from at least once per 15 days to at least one time per month. Also as a result of the comment, some minor wording changes are made, including adding that the Department will prescribe the "manner" of electronic reporting. This clarifying change will allow the Department the flexibility to develop a workable electronic reporting system. A school may seek the Department's approval for a delay in electronic submission on a case-by-case basis. In addition, the Department may approve a school submitting required data in an alternate manner if the school demonstrates that the electronic reporting requirements would cause a substantial hardship to the school. Because of a statutory change, schools no longer submit written, monthly progress reports on student attendance to the Department. The electronic reporting requirement is necessary so that the Department can obtain information on students' accrued hours in a timely and efficient manner. New subsection (z) requires that a school maintain the monthly progress report of student attendance, which is required to be maintained by Texas Occupations Code, §1601.561(a), throughout the student's enrollment and for 48 months after the student completes the curriculum, withdraws, or is terminated.

New subsection (aa) of §82.72 requires an establishment to display, in a conspicuous place clearly visible to the public, a copy of the establishment's most recent Department inspection report. This requirement is necessary to keep public patrons and students of the establishment informed of the establishment's inspection results.

Section 82.73 is amended to add new language to subsection (a) that a student shall not engage in dishonesty or misrepresentation relating to a student's accrued hours. As licensees of the Department, students should be held responsible for dishonesty related to accruing hours. Other provisions are deleted and with some modification, relocated to other sections.

For better readability, new §82.74 consolidates, with some modification, existing rule provisions concerning withdrawal, reentry, or transfer of students. Subsection (a) requires that a school electronically submit a student's withdrawal or termination to the Department. This electronic submittal requirement is necessary

to establish a more efficient process of withdrawing and terminating students. Changes are made to the time frames specified in the proposed version of the rule. The time frame in which a school must electronically submit to the Department a student's withdrawal or termination is reduced from 15 days to 10 days. Also, a student is considered terminated after not attending school for 30 days, rather than the proposed 60 days, with the exception of a documented leave of absence. These changes result from the O. G.'s School of Hair Design comment related to electronic reporting, which is discussed above. The comment prompted the Department to reevaluate whether electronic reporting time frames in the rules are appropriate. These changes also result from a public comment submitted in response to similar rules proposed in the cosmetology program. The time frames in the adopted rule are necessary to ensure that only those students who are in fact attending school are shown as enrolled in the school's and the Department's records.

Section 82.80(b) is amended to eliminate the renewal fee for a student permit. A student permit expires after two years, so a student who requires a permit for longer than two years would need to apply for and receive a renewed permit. However, no fee would be charged for the renewal. This change makes the rule consistent with the student renewal process in the cosmetology program.

Section 82.100 is amended to remove from definitions the word "hard" from the phrase "hard, nonporous surfaces." This change is necessary for clarification because some surfaces that are non-porous and can be disinfected are not hard surfaces. Additionally, the definition of "disinfectant" is amended to make the reference to chlorine bleach solution consistent with other references to chlorine bleach.

Section 82.101(b) is amended to remove language that may be inconsistent with other references to chlorine bleach.

Section 82.102(c) is amended to clarify that other rules may require that chairs or dryers be disinfected prior to use for each client. This clarification is necessary because amendments to other health and safety rules require chairs to be disinfected in certain situations. Subsection (l) is amended to add that towels must be washed in hot water and chlorine bleach. To protect the health and safety of customers of barber establishments, the Department believes that the rules need to give direction to licensees on how towels are to be cleaned.

Section 82.104 is amended to add that facial chairs and beds are to be disinfected prior to providing service to each client. Based on input the Department has received concerning sanitation, the Department believes that a requirement to disinfect facial chairs and beds is needed. Language is also added that the chair or bed must be made of or covered in a non-porous material that can be disinfected. This language is necessary to ensure that the chair or bed is capable of being disinfected.

Section 82.106(d) is amended to clarify that certain implements must be sterilized, in addition to being cleaned and disinfected, in accordance with Texas Occupations Code, §1601.506(e) and §1603.352(a). Corrections are made to the list of implements.

Section 82.107 is amended to add that electric drill bits used in manicure and pedicure services must be sterilized. Texas Occupations Code, §1603.352(a) requires sterilization of all nondisposable instruments used to perform manicure and pedicure services.

Section 82.108 is amended to add a new subsection (g), which requires that footspa chairs shall be cleaned and disinfected prior to providing service to each client. The Department believes that this requirement is necessary because of the risk of infectious and contagious diseases being transmitted by footspas. Language is also added that the chair must be made of or covered in a non-porous material that can be disinfected. This language is necessary to ensure that the chair is capable of being disinfected.

Section 82.114(b) is amended to clarify that carpet in barber establishments is not limited to reception areas. Carpet is permitted in all areas except the specified areas in which floors are required not to be porous or absorbent.

Section 82.120 is amended to update curriculum requirements. Specific time requirements for full-time and part-time student teachers are deleted as unnecessary. The Department believes that the requirement to complete the course of instruction in not less than 26 weeks is sufficient. Wording throughout the rule is simplified and made more consistent. Hours of credit for school orientation is deleted and added to other, more substantive, topics. The curriculum for a class A barber certificate is amended to require eight hours of manicuring, rather than allowing manicuring to be an optional part of the curriculum. This change is necessary because, under Texas Occupations Code, Chapter 1601, a class A barber may perform any act of barbering, including manicuring.

Based on the recommendation of staff and the Board, the adopted rule deletes from §82.120(b), (c), (d), and (e) the orientation portion of each curriculum. Under the proposed rules, no credit is awarded for the orientation, so it is not necessary to include this subject in the curriculum. Additionally, the date of the Commission meeting in proposed §82.120(g) is changed to June 14, 2006, and the wording of this provision is changed so that amendments to §82.120, concerning barber school curricula, do not technically have a separate effective date from other rule changes. However, the rule changes in §82.120 would apply to students who enroll in a barber school on or after September 1, 2006. In subsection (c), typographical errors are corrected in the total number of hours listed for instruction in practical work and in the spelling of "massage."

The department drafted and distributed the proposed rules to persons internal and external to the agency. Two comments were received in response to the proposed amendments.

O. G.'s School of Hair Design objects to the proposed language of §82.72(o), requiring a barber school to maintain an album of student permits. The commenter wishes to retain the current requirement for a student to display the student's permit at the student's station. The commenter believes that the current requirement is a teaching aid for students that establishes awareness of barber laws that they must adhere to as licensed barbers. In addition, the commenter believes that displaying a permit at the student's station makes the permit easily accessible to Department inspectors. The Department agrees with the commenter's point about the importance of requiring a student, as a Department licensee, to display a permit at the student's station. However, the Department also believes that displaying permits in an album is useful for verification by Department inspectors. As discussed above, the rule language is changed to require that the school's portion of the permit be displayed in an album and that the student's portion of the permit be displayed at the student's station.

O. G.'s School of Hair Design objects to the time frame for barber schools to submit electronic reports of accrued student hours to the Department. The commenter also expresses concern about schools being uncertain of the process or format for electronic submissions. The Department agrees that the time frame for electronic reporting should be increased, and, as discussed above, the adopted rule is changed to address the commenter's concern. The Department is in the process of developing a system of electronic reporting that will be easy for schools to access and use, but many of the details of the system have not been determined at this time. When the electronic reporting system is fully developed, the Department will make schools aware of the specific requirements. The rule has been changed to clarify that the Department will specify the "manner" of electronic reporting. However, the Department does not believe that it is appropriate to specify the detailed manner and format of electronic reporting in the rule itself.

A commenter suggests specifying in §82.102(c) that towels must be washed in water that is 150 degrees Fahrenheit. The commenter indicates that some washing machines are sold with a built-in heater capable of heating water to that temperature. The rule as proposed specifies that towels must be washed in hot water and chlorine bleach. The Department disagrees with the comment. The Department believes that the rule as proposed, which requires chlorine bleach in addition to hot water, is sufficient to protect health and safety. In addition, a specific temperature requirement would be impractical to enforce.

16 TAC §§82.10, 82.20, 82.21, 82.26, 82.50, 82.51, 82.53, 82.70 - 82.74, 82.80, 82.100 - 82.102, 82.104, 82.106 - 82.108, 82.114, 82.120

The amendments and new rules are adopted under Texas Occupations Code, Chapters 51, 1601, and 1603, which authorize the Department to adopt rules as necessary to implement these chapters. In particular, the rules implement provisions of Senate Bill 411, 79th Legislature, Regular Session.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 1601 and 1603. No other statutes, articles, or codes are affected by the adoption.

§82.72. Responsibilities of Barber Schools.

(a) If a barber school changes ownership, the new owner shall notify the department of the change and apply for a new permit from the department within thirty days of the change of ownership.

(b) The department shall inspect a barber school that has changed ownership to determine that it fulfills all requirements of the department and of the Act.

(c) A new permit fee shall be required from a barber school that has changed ownership.

(d) A barber school must have one barber chair available for each student in attendance on the practical floor. Additional students in attendance must be assigned to the beginner's department or theory classroom.

(e) A barber school shall furnish each student within seven days of the student's enrollment his or her own copy of the law and rules book published by the department. Each student shall retain permanent ownership of the books so that he or she will have ready access to and be knowledgeable of the laws and rules that regulate barbering.

(f) The barber school must issue within seven days of enrollment each student his or her own textbook or books which shall contain all subjects referred to in Texas Occupations Code §1601.558. The department must approve each textbook or books before it may be used in the barber school curriculum.

(g) Within 30 days of enrollment, a barber school shall furnish to or ensure that each student is equipped with his or her own personal tools which must include the following:

(h) No student may take instruction or accrue hours for practical work unless he or she is equipped with the tools required above.

(i) Each barber school shall have:

(1) for each student in attendance on the practical floor, enrolled in a manicurist course outlined in §82.120, one complete manicure table, one complete set of manicuring implements for plain and sculptured nails, and one textbook with complete instructions;

(2) an adequate supply of permanent wave rods;

(3) a minimum of two canvas-type wig blocks;

(4) two mannequins, one long-haired and one short-haired;

(5) a minimum of one wig, one hairpiece, and one hairwoven piece;

(6) clock;

(7) bulletin board;

(8) fire extinguisher with current inspection report;

(9) teacher's desk in classroom; and

(10) if providing manicure or pedicure nail services, a department-approved sterilizer.

(j) Each classroom consultant to theory instruction in a barber school shall have a valid Texas barber teacher's certificate, an academic degree or specialized training or expertise in the subject being taught if the subject pertains to material relating to barbering.

(k) A student teacher may instruct theory only if assisted by a person holding a teaching certificate.

(l) Whenever an approved barber school is without the services of at least one teacher who has a valid Texas barber teacher's certificate for all or any portion of three consecutive business days, no instruction may be provided, and no student shall accrue hours for either practical work or theory for the duration of such absence.

(m) A barber school shall submit each application for student permit which shall include the following items:

(1) the original of the application for student permit form; and

(2) proof of a seventh-grade education or its equivalency. This shall be in the form of a transcript or copy of the diploma, equivalency certificate, or record.

(n) Application for a student permit must be sent to the department in complete form within ten days of actual date of enrollment. After the department receives the completed student permit application, the department will issue a student permit which gives the student the right to do barber service only in the school. The school shall affix to the student permit two current photographs furnished by the student, one photograph affixed to the school's portion of the permit and one photograph affixed to the student's portion of the permit. No student permit is valid unless these photographs are attached thereto.

(o) A barber school shall maintain one album displaying the school's portion of student permits, including affixed picture, of all enrolled students. The permits shall be in alphabetical order. No student

may accrue hours for practical work or theory unless the student's permit is displayed in accordance with this subsection.

(p) Each barber school approved by the department shall include in its instruction the curricula approved by the department.

(q) No business other than the teaching and practicing of barbering can be operated on the premises of a barber school, with the exception of vending machines or retail products directly relating to hair care.

(r) Only a permitted barber school, barbershop, or manicurist specialty shop or a licensed barber may advertise in the yellow pages of the telephone directory under "Barber."

(s) Schools may establish rules of operation and conduct, which may include rules relating to student clothing, that do not conflict with this chapter.

(t) A student enrolled in a barber school must wear a clean uniform or smock during school hours.

(u) Barber schools are responsible for compliance with the health and safety standards of this chapter.

(v) Alterations to the school's floor plan must be in compliance with the requirements of the Act and this chapter.

(w) Barber schools shall notify the department in writing of any name change of the school within thirty days of the change.

(x) Barber schools shall maintain a current mailing address on file with the department and must notify the department not later than thirty days following any change of mailing address.

(y) At least one time per month, barber schools shall submit to the department an electronic record of each student's accrued hours, in a manner and format prescribed by the department. The initial submission of student hours shall include all student hours accrued at the school. Delayed data submission(s) are permitted only upon department approval, and the department shall determine the period of time for which a school may delay the electronic submission of data on a case by case basis. Upon department approval, a school may submit data required under this subsection in an alternate manner and format as determined by the department, if the school demonstrates that the requirements of this subsection would cause a substantial hardship to the school.

(z) A school shall maintain and have available for department and/or student inspection the monthly progress report required by Texas Occupations Code, §1601.561(a), documenting the daily attendance record of each student and number of credit hours earned. The school shall maintain the monthly progress report throughout the period of the student's enrollment and for 48 months after the student completes the curriculum, withdraws, or is terminated.

(aa) A barber establishment shall display in the establishment, in a conspicuous place clearly visible to the public, a copy of the establishment's most recent inspection report issued by the department.

§82.73. Responsibilities of Students.

(a) A student shall not engage in any act of dishonesty or misrepresentation relating to a student's hours accrued under this chapter.

(b) The student is responsible for ensuring that the student's portion of a student permit is on display at all times during the student's enrollment at or near the student's work station. Students are responsible for compliance with the health and safety standards of this chapter.

(c) Students shall maintain a current mailing address on file with the department and must notify the department not later than thirty days following any change of mailing address.

§82.74. Responsibilities--Withdrawal, Reentry, or Transfer of Student.

(a) Withdrawal. Except for a documented leave of absence, schools shall electronically submit a student's withdrawal or termination to the department within 10 calendar days after the withdrawal or termination. Except for a documented leave of absence, a school shall terminate a student who does not attend a barber curriculum for 30 days.

(b) Reentry. If a student returns to the same barber school after interruption, the school shall notify the department in writing, and a student permit shall be reissued.

(c) Transfer of student hours between Texas schools. When a barber school accepts a transfer of a student from another school, the accepting school shall notify the department of the transfer, on a form prescribed by the department, and request that the department issue a new student permit for the transferring student.

(1) Upon receipt of the accepting school's notification of transfer, the department shall notify the school at which the student was formerly enrolled of such transfer.

(2) Upon receipt of the department's transfer notification, the manager or owner of the barber school shall, within seven days of receipt of the department's transfer notification, send to the department the student permit with the following information written on the permit:

(A) the last day of the student's attendance;

(B) the number of credit hours accrued by the student; and

(C) the manager's or owner's signature.

(d) Transfer of student hours from out of state.

(1) A student may transfer to Texas hours of barber training received from a school of another state by providing the following to the department:

(A) an official transcript from the school attended, showing hours credited;

(B) a statement from the licensing authority of the other state showing hours credited; and

(C) proof of at least a seventh grade education.

(2) If the student has not completed 1,500 hours in another state, credit for hours completed will be given when he or she is enrolled in a Texas barber school and when a student permit is issued.

§82.120. Technical Requirements--Curricula.

(a) Requirement for enrollment. No person may enroll in a teacher's course in an approved barber school before receiving a certificate of registration as a Class A barber.

(b) The curriculum for the teacher's certificate consists of 1,000 hours, to be completed in a course of not less than 26 weeks, as follows:
Figure: 16 TAC §82.120(b)

(c) The curriculum for the class A barber certificate consists of 1,500 hours, to be completed in a course of not less than nine months, as follows:

Figure: 16 TAC §82.120(c)

(d) The curriculum for the manicurist license consists of 600 hours, to be completed in a course of not less than 16 weeks, as follows:
Figure: 16 TAC §82.120(d)

(e) The curriculum for the barber technician license consists of 300 hours, to be completed in a course of not less than eight weeks, as follows:
Figure: 16 TAC §82.120(e)

(f) The curriculum for a barber refresher course consists of 300 hours as follows:
Figure: 16 TAC §82.120(f)

(g) The changes to this section, as adopted by the commission on June 14, 2006, shall apply to students who enroll in a barber school on or after September 1, 2006.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 12, 2006.

TRD-200603725
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: August 1, 2006
Proposal publication date: April 14, 2006
For further information, please call: (512) 463-6208

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16 TAC §82.32

The repeal is adopted under Texas Occupations Code, Chapters 51, 1601, and 1603, which authorize the Department to adopt rules as necessary to implement these chapters. In particular, the rules implement provisions of Senate Bill 411, 79th Legislature, Regular Session.

The statutory provisions affected by the repeal are those set forth in Texas Occupations Code, Chapters 51, 1601 and 1603. No other statutes, articles, or codes are affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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William H. Kuntz, Jr.
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CHAPTER 83. COSMETOLOGISTS

16 TAC §§83.10, 83.20 - 83.23, 83.25, 83.26, 83.31, 83.40, 83.50, 83.51, 83.53, 83.70 - 83.74, 83.80, 83.100 - 83.102, 83.104, 83.106 - 83.108, 83.114, 83.120

The Texas Commission of Licensing and Regulation ("Commission") adopts amendments to existing rules at 16 Texas Administrative Code, Chapter 83, §§83.21 - 83.23, 83.25, 83.26, 83.31, 83.40, 83.50, 83.51, 83.53, 83.70, 83.73, 83.80, 83.100 - 83.102, 83.104, 83.106 - 83.108, and 83.114; and new rule §83.74, regarding the licensing and regulation of cosmetology as published in the April 7, 2006, issue of the *Texas Register* (31 TexReg 2970) without changes and will not be republished. The Commission also adopts amendments to existing rule §§83.10, 83.20, 83.71, 83.72, and 83.120 as published in the April 7, 2006, issue of the *Texas Register* (31 TexReg 2970) with changes. These rules are republished.

The amendments and new rule clarify licensing, inspection, curriculum, and regulatory requirements; rename the existing hair weaving/braiding curriculum "hair weaving;" add a hair braiding curriculum and a hair braiding specialty certificate; add a definition for hair braider, hair weaver, and hair weaving; add electronic reporting requirements for cosmetology schools; add a term of two-years to student permits; add disinfecting requirements for foot spa chairs and facial beds and chairs; and reorganize certain sections for greater clarity and readability.

The proposed amendments and new rule and were filed with the *Texas Register* on March 27, 2006 and published on April 7, 2006. The thirty-day comment period closed on May 8, 2006. Staff received many oral comments (summarized in writing) and 85 written comments in response to the proposed rules. Based on the public comments, staff recommended changes to the proposed rules for consideration by the Advisory Board on Cosmetology on May 22, 2006. After modifications, the Advisory Board on Cosmetology recommended that the Commission adopt the proposed rules with staff recommended changes.

Public Comments, Hair Weaving and Braiding

The department received comments from 19 individuals, 24 cosmetology schools (including a school's petition with 30 names), 4 comments from the Senegalese Association of Houston (including multiple petitions with a total of 553 names), the Institute for Justice, and First Advisors & Associates who disagreed with the proposed rules concerning hair weaving and braiding under §§83.10, 83.20, and 83.120. Only one comment, from a cosmetology school, agreed with the hair weaving/braiding rules as proposed.

Public Comments, Staff Responses, and Staff Recommended Changes Relating to §83.10 (Defining Hair Weaver or Braider)

Chemicals

Comments primarily from persons who braid hair and persons who obtain braiding services agreed with the proposed language in §83.10(9) (definition of hair weaver or braider) to exclude the use of chemicals and emphasized that braiders do not utilize chemicals for any purpose. However, other comments, primarily from cosmetology schools, disagreed with the proposed rule and stated that the scope of practice of weaving and braiding includes the use of chemicals. Upon reviewing the comments, the department agrees that the practice of braiding does not utilize chemicals, and agrees that some weaving methods utilize chemical adhesives and glues.

Shampooing, conditioning, and drying

Comments primarily from braiders disagreed with the proposed §83.10(9) (definition of hair weaver or braider) relating to shampooing, conditioning, and drying, and stated that braiders require clients to arrive for a braiding service with clean hair. These

comments stated that braiders do not shampoo, condition or dry hair. Other comments agreed with the proposed rule and stated that the cleanliness of the hair and braids is important to client health. One comment noted that hair weaving/braiding specialty salons are required to have shampoo bowls and dryers. Upon reviewing the comments, the department agrees that the full practice of weaving/braiding (performed by current weaving/braiding licensees) does include shampooing, conditioning, and drying hair, and these subjects are taught/required in the existing 300 hour weaving/braiding curriculum. Also, based on the comments, the department agrees braiders require clients to arrive for a braiding service with clean hair and ensure client health in determining this fact prior to any service. The department also agrees that existing rule §83.71 requires hair weaving/braiding specialty salons to have shampoo bowls and dryers.

Styling, cutting, and trimming

Proposed rule §83.10(9) stated that a weaver or braider may style, cut and trim hair as long as these services are incidental to the braiding/weaving service. Comments primarily from braiders disagreed and stated that braiders do not perform styling services and only trim commercial hair extensions. Other comments referred to styling, cutting, and trimming as acts included within the scope of weaving/braiding. Based on the comments, the department agrees that braiders do not offer styling, cutting, and trimming services other than to trim ends of hair extensions incidental to the braiding service. The department also agrees that the existing full scope of weaver/braider services does include these services.

Pursuant to Texas Occupations Code §1602.258 and §1602.002(a)(2) and (b), staff recommended changes to the proposed definition of a "hair weaver or braider" to create a distinction between weaving and braiding based on the numerous rule comments that stated many differences between these acts of cosmetology. Specifically, staff recommended that the proposed "hair weaver or braider" definition be changed to re-name the proposed definition "hair weaver." This definition will maintain the acts stated in the proposed definition of shampooing, conditioning, drying, styling, cutting, or trimming hair only to the extent these activities are incidental to the hair weaving service. Staff also recommended a definition to define "weaving" as the process of attaching commercial hair by any means to a client's hair or scalp. Staff also recommended a change to the proposed definition by designating the "or braider" part of the proposed definition as a separate definition. Staff recommended a change to the definition for a "hair braider" to exclude the practice of shampooing, conditioning, drying, styling, cutting, or trimming client hair except to allow only the trimming of hair extensions as applicable to the braiding process and to exclude the use of any chemicals in braiding services.

Staff also recommended a change to the equipment requirements for a hair weaving/braiding salon under §83.71. The proposed rule requires certain equipment to be provided for each licensee present and providing services. The staff recommended change modifies this proposed rule to clarify that shampoo bowls and dryers are required only for persons who are providing weaving services. This recommended change to the proposed rule is consistent with the staff recommended change to allow weavers to shampoo, condition and dry hair, while braiders may not perform shampooing, conditioning or hair drying services.

Public Comments, Staff Reponses, and Staff Recommended Changes Relating to §83.20 (Hair Weaver and Braider Licensing Requirements: Total Curriculum Hours and Examination)

§83.20(a)(5), Number of Hours to Obtain a Hair Weaving or Braiding License

All comments that referred to the proposed rule under §83.20 to reduce the number of training hours to obtain a weaving/braiding specialty certificate from 300 hours to 80 hours disagreed with the proposed rule.

Many comments disagreed with the proposed 80 hours as being unreasonably low. These comments urged a higher number of hours and stated that more education is needed, not less. Some comments stated that consumers may have serious problems from hair loss resulting from braiding and weaving services. Another comment stated that a higher number of hours will allow students to obtain federal education loans. Many comments stated that if a person does not know braiding and weaving services, 80 hours is insufficient to teach the course. Another comment unfavorably compared the proposed 80 hour weaving/braiding course, which includes shampooing and conditioning, to the existing 150 hours for the shampoo and conditioning specialty certificate curriculum. One comment stated generally that 80 hours for any cosmetology license is unreasonable. Numerous comments stated that the field of weaving/braiding will be reduced to a non-professional status, that the market will be flooded with people offering braiding or weaving services with minimal training and that weaver/braider licensees will practice beyond the scope of that specialty. Some comments requested that more hours than the existing 300 hours should be required and urged 750 hours; some requested that the requirement remain at 300 hours; some requested amounts less than the existing 300 hour requirement, but higher than the proposed 80 hours.

Other comments also disagreed with the proposed 80 hours, but advocated that 80 hours is unreasonable high and requested 0 hours. These comments compared braiding and weaving with training requirements for other certifications/licenses, such as tattoo artists, food service managers, commissioned security officers, etc. and stated that these training programs require much less than 80 hours and involve more health and safety issues than hair weaving/braiding. These comments also compared the 80 hours to 10 states that choose not to regulate this field of cosmetology. Some comments suggested a 1-page sanitation pamphlet (similar to Kansas and Mississippi), while others suggested a 6 hour curriculum (on the basis that Texas tattoo artists have 6 hours of training), and another suggestion was to only require a 16-hour (2 day) course (similar to Florida).

Pursuant to Occupations Code §§1602.002(a)(2), 1602.002(b), and 1602.258, and based on the public comments to the proposed rules, staff recommended the creation of a hair braiding specialty certificate and a hair weaving specialty certificate. In response to the comments and based on the staff recommended change to the definition of hair braiding, the department recommended that the proposed hair weaving/braiding curriculum be re-named "hair braiding" and reduced to 60 hours to reflect the limited scope of practice for hair braiders. Upon discussion of the comments and staff recommendations, the Commission reduced the hair braiding curriculum to 35 hours. Staff also agrees with the comments concerning the 300 hour curriculum and recommended that the hair weaving/braiding curriculum be maintained as a 300 hour curriculum and re-named "hair weaving" without substantive change to the existing course consistent with staff's concurrent recommendation for the definition of hair weaver. Staff recommended that references to "weaving/braiding" in the curriculum be changed to "hair weaving."

§83.20, Examination Requirements to Obtain a Hair Weaving or Braiding License

Staff received many comments that disagreed with the proposed rule to amend §83.20 to delete the written and practical examination requirements to obtain a hair weaving/braiding license. These comments stated that the examinations should be required so that the department can be assured that a weaver/braider understands certain issues and is able to apply knowledge, especially relating to the health and safety standards. Other comments advocated that at least the written examination should be required if the hours are reduced. Staff also received comments primarily from hair braiders that agreed with the proposal to eliminate the examination. The department agrees the written and practical examinations should be retained for the existing 300 hour hair weaving/braiding course (re-named to 'hair weaving') and disagrees with comments to keep the existing written and/or practical examinations for the limited scope of braiding. The department agrees with comments to keep the proposed rule to delete the examinations for braiders because of the limited scope of practice of braiding and the reduced course hours to obtain a hair braiding specialty certificate.

General

As general comments, one comment suggested that a person should need more than a weaving/braiding license to touch the hair and skin of another and another comment stated that there should be no specialty licenses at all. On the other hand, other comments stated that hair weaving and braiding should be permitted without any license or regulation. Some comments generally expressed that there should be increased inspections for braiding salons if the licensing requirements are reduced.

In response, Texas Occupations Code §1602.258 authorizes specialty certificates for the practice of cosmetology defined in §1602.002(2) (weaving or braiding a person's hair). Similarly, the scope of cosmetology is defined to include "weaving or braiding a person's hair" as a regulated act when performed for compensation. In response to the comments regarding increased inspections, all cosmetology establishments are subject to initial and periodic inspections. Further inspections, "risk-based inspections," will be imposed on those establishments that have repeated sanitation violations or violations relating to unauthorized or unlicensed practices of cosmetology.

Public Comments, Staff Reponses, and Staff Recommended Changes Relating to §83.120 (Curriculum for Hair Weavers and Braiders)

The department received numerous comments primarily from hair braiders and schools that disagreed with the proposed amendments to the hair weaving/braiding curriculum under §83.120.

Many comments advocated not reducing the hair weaving/braiding standards, especially relating to health and safety issues. Other comments emphasized both the importance of hair and scalp analysis due to a risk of hair loss and breakage and the shampooing of hair for the safety of both the licensee and the client.

Other comments, primarily from hair braiders, disagreed with the proposed curriculum, and advocated that the curriculum should be further reduced. Specifically, these comments stressed that cosmetology instructors do not teach braiding skills effectively, that there are many different braiding styles and that ultimately, braiding is an art and may take years to master. Further, these comments urged that the following curriculum content be deleted: shampooing and conditioning, hair and scalp analysis, and professional practices; and recommended deleting instruction in face and head shapes, facial features, sectioning and parting, special effects, trimming of hair ends and perimeter lines, scalp care, pre/post care, home care and follow-up maintenance. These comments also suggested combining the 'law and rules' curriculum with the 'health and safety' curriculum.

In response, staff agrees with comments that instruction in hair and scalp analysis is an important part of both hair braiding and the hair weaving curriculums and disagrees with those comments that urge the deletion of hair and scalp analysis from the braiding curriculum based on the public health concerns relating to the identification of hair and scalp diseases. Staff agrees that instruction in shampooing, conditioning, and drying should not be in the braiding curriculum, as braiders do not offer this service (concurrently stated in a staff recommended change to §83.10). Staff also agrees that these skills should be maintained in the full 300 hour curriculum for hair weavers, as it currently exists.

Also, staff recommended a change to the curriculum under §83.120 for "hair braiding" to reflect that braiders may only trim artificial hair as applicable to the braiding process and to delete instruction for braiders in methods of weaving.

Staff also recommended a change not to delete the existing curriculum for hair weaving/ braiding, as proposed, and recommended a change to re-name this existing course "weaving." Staff also recommended a change to the references within the existing curriculum to refer to "weaving."

Finally, staff recommended a change to clarify the language relating to the effective date of the changes to the curriculum. This staff recommended change only clarifies language, and does not change the effective date of September 1, 2006 as was originally proposed.

Public Comments relating to §83.31, License Terms (Two-Year Student Permit)

One comment from a school agreed with the proposed rule under §83.31 to implement a two-year student permit. No comment disagreed.

Public Comments, Staff Reponses, and Staff Recommended Changes Relating to §83.72 (School Responsibilities - Electronic Reporting)

The department received comments from 45 schools, 13 individuals, A.T.T.A.C.K. Systems, and First Advisors & Associates, who disagreed with the proposed rules concerning electronic reporting for schools under §83.72.

Reporting Interval for Student Clock Hours

Many comments primarily from schools disagreed with the proposed rule under §83.72(l) requiring schools to electronically report student hours at least one time per 15 calendar days (15 day interval). The majority of comments urged that electronic reporting of student hours should be required once each month, as opposed to the proposed 15 day interval. Numerous comments stated that existing software in schools allows for monthly calculations and that based on school software, monthly reporting is better for schools. One comment stated that schools provide monthly reports to other agencies and organizations, such as the Department of Education, the National Accrediting Commission

of Cosmetology Arts and Sciences, and the Texas Workforce Commission. Other comments suggested increasing the reporting interval to report hours at the end of a student's course, or at intervals such as 500, 1000, and 1500 hours.

Staff agrees with the numerous comments to increase the reporting interval of student clock hours. Based on the majority of comments, the department recommended a change to the proposed rule to allow schools to report student hours at least one time per month and added the word "clock" to clarify that the hours reported are the students' accrued clock hours to avert confusion about reporting accrued practical applications.

Reporting Interval for Practical Applications of the Curriculum

Many comments from schools urged that electronic reporting of a student's practical applications of the curriculum occur only at the end of a course or upon a student's withdrawal from the course. Schools emphasized that students keep the records of their practical applications and that schools only calculate the accrual of practical applications at the end of the course; other comments stated that practical applications are kept per week, while another comment stated that practical applications are calculated per month. One comment raised the issue that some schools may require practical applications in excess of the department's rules and questioned how the department would track variable reports of practical applications. One comment expressed concern because practical applications may be accrued at a faster rate later in a course due to the skills a student acquires later in a course.

In response, staff agrees with comments to increase the reporting interval for student practical applications. Staff recommended a change to allow schools to report a student's total number of practical applications of the curriculum at the student's completion of the course or at a student's withdrawal from the course. In response to the comment stating that the number of practical applications a school may require is variable, staff recommended that the existing rule language relating to practical applications of the curriculum not be moved from §83.120(d) to subsection (a) as proposed because staff intends to review school and student requirements and responsibilities relating to practical applications of the curriculum and may seek to clarify §83.120(d) in future rulemaking.

Reporting Interval for Student Terminations and Withdrawals

Two comments referenced the proposed 60 days to terminate a student who does not attend class and who is not on an authorized leave of absence under proposed rule §83.72(m). These comments indicated the interval is too long and one comment recommended that this information be reported monthly, along with the comment's recommendation that student hours be reported monthly. Also pertaining to proposed rule §83.72(m), a comment stated that 15 days to report a student's withdrawal or termination to the department is too long and suggested 10 days on the basis that the Department of Education requires 10 days to report this same information.

In response, staff agrees and recommended a change to the proposed rule to state that a school must terminate a student within 30 days of non-attendance unless the student is on a documented leave of absence, and recommended a change to the proposed rule to state that a school must electronically report a student's withdrawal or termination within 10 calendar days after the withdrawal or termination.

General

Many comments were concerned with the specific software, programming, and electronic interface for the submission of student hours. These comments expressed concern about whether the process would be understandable and user friendly. Numerous comments disagreed with electronic reporting generally, stating that more office personnel would be needed to input/send an electronic report. Other comments stated that an instructor would teach less in order to spend more time on reporting. Many comments stated that schools would need to acquire a computer, software, and/or internet service to comply with the requirement. Other comments disagreed generally stating that this created undue accountability on schools. One comment stressed that time cards are the most reliable method of calculating a student's time.

In response to the details of the electronic reporting system, the electronic reporting system is under development and detailed information is not currently available. Regarding the use of instructor time to electronically send student hours, the proposed rules allow school owners or school designees to electronically report hours. Regarding the comments pertaining to buying a computer, hiring additional office personnel, and other economic concerns, the proposed rule allows schools, upon department approval, to submit data in a manner other than electronically if the school demonstrates that the electronic submission requirements would cause a school substantial financial hardship. Also, the proposed rule also allows for delayed data submissions upon department approval. In response to the comment that time cards are the most reliable method of keeping time, schools must utilize student time clock records in accordance with §83.72(k); the electronic reporting is a sum total of the time accrued as demonstrated by a student's daily time clock record, whether the time is kept by a manual or software time clock system.

Public Comments and Staff Responses Relating to §§83.102, 83.104, and 83.108, Health and Safety Standards, General Requirements, Facial Services, and Foot Spas

Staff received 3 comments that agreed and 2 comments that disagreed with the proposed rules under §§83.102, 83.104, and 83.108, requiring pedicure foot spa chairs and facial chairs and beds to be cleaned and disinfected prior to each client's service. One comment stated that the department's focus should remain on health and safety issues. In disagreement, one comment stated that people come into contact with chairs everyday that are not disinfected. Another comment in disagreement stated that it would be costly to replace existing chairs with chairs that are made of a material that can be disinfected; this comment also stated that cloth chairs are for client comfort.

In response, staff disagrees that new foot spa chairs, facial chairs and facial beds must be purchased, as the proposed rule states that these items may be covered with a non-porous material that can be disinfected. Staff agrees that chairs people come into contact with every day are not disinfected; however, staff believes that based on information obtained by a Texas health department and prior enforcement cases, the public benefit outweighs the burden on licensees to wipe foot spa chairs and facial beds and chairs with a disinfectant solution for each client service.

Public Comments and Staff Responses Relating to §83.102, Health and Safety Standards-General Requirements (washing towels)

One comment from a barber (pursuant to an identical, concurrently proposed rule to amend the barber rules) disagreed with

the proposed rule (cosmetology proposed rule §83.102) that requires towels to be cleaned in hot water and chlorine bleach. The comment stated that 150 degrees of hot water should be required for the purpose of killing a higher amount of bacteria. This comment stated that washing machines have built-in water heaters capable of achieving this temperature.

In response, the comment to impose a 150 degree water temperature for washing towels is a more stringent requirement than the requirement stated in the proposed rule to wash towels in hot water and chlorine bleach. Additionally, making this change would impose economic ramifications on many salons and schools to obtain a washer that has a water heater. For these reasons, such a rule change would need to be separately proposed and subject to public comment so that interested persons could have notice of the more stringent requirement and an opportunity to provide comment specifically relating to a proposal to impose a responsibility to wash towels in water that is 150 degrees.

Other Public Comments and Staff Responses

Some comments included general questions or comments on existing rules or on topics not pertaining to proposed rule language. These comments included questions relating to the following topics: the department's determination to cease collecting evidence of a student's tuition status under the contract between the school and the student; the feasibility of providing modified examinations for special education students; the determination of what is a "sufficient" number of shampoo bowls in a salon; the determination of whether schools may offer refresher courses; and a request for clarification that private schools may contract with local education authorities to provide services to public school students.

The comments relating to special education examinees, the quantity of required shampoo bowls in a salon, and a clarification that a private cosmetology school may contract with local education authorities exceeds the scope of these proposed rules. The topics as described by these comments would need to be stated within a proposed rule, then subject to public comment in a separate rulemaking action. The department's determination to cease collecting evidence of student's non-payment of tuition is based on Senate Bill 411, 79th Legislature, Regular Session 2005, which repealed Occupations Code §1602.454. Before it was repealed, Occupations Code §1602.454 required schools to notify the Texas Cosmetology Commission of whether agreed tuition had been paid. Accordingly, because this provision was repealed, rules enacted pursuant to that statutory provision were repealed. Specifically, the department allows persons to access the examination process if the person meets the statutory requirements for an examination. Relating to the comment on refresher courses, schools are authorized to offer courses (to lead to a department license) only as prescribed under Occupations Code, Chapters 1602 and 1603, and the rules adopted pursuant to that authority. Schools are not prohibited from offering cosmetology refresher courses; however, such courses are not regulated by the department.

The amendments and new rule are adopted under Texas Occupations Code, Chapters 51, 1602, and 1603, which authorizes the Department to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department. The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 1602, and 1603. No other statutes, articles, or codes are affected by the adoption.

§83.10. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--Texas Occupations Code, Chapters 1602 and 1603.

(2) Beauty Culture School--A cosmetology school licensed under the Act, public or private.

(3) Board--The Advisory Board on Cosmetology.

(4) Booth rental license--A license that allows an operator, manicurist, facialist, hair weaver or braider, wig specialist, or instructor to lease space on the premises of a beauty shop to engage in the practice of cosmetology as an independent contractor.

(5) Department--The Texas Department of Licensing and Regulation.

(6) Commission--The Texas Commission of Licensing and Regulation.

(7) Cosmetology establishment--A beauty salon, specialty salon or school, public or private, licensed under the Act.

(8) Facialist--A person who holds a specialty license and who is authorized to practice the application of facial cosmetics, manipulations, eye tabbing, arches, lash and brow tints, and the temporary removal of hair by the use of depilatory, mechanical tweezers, or wax.

(9) Hair braider--A person authorized by the department to braid hair. Such practice shall not include shampooing, conditioning, drying, styling, or applying any chemicals, including color chemicals, relaxers, perm solutions, or other preparations to alter the color or to straighten, curl or alter the structure of hair. A hair braider may trim hair extensions only as applicable to the braiding process. Commercial hair may be attached only by braiding and without the use of chemicals or adhesives.

(10) Hair weaver-- person authorized by the department to perform the services of a hair braider as defined in this section and, additionally, may attach hair by any weaving method. Such practice shall not include shampooing, conditioning, drying, styling, cutting, or trimming hair except to the extent such activity is incidental to a hair weaving service. Such practice shall not include the application of color chemicals, relaxers, perm solutions, or other preparations to alter the color or to straighten, curl, or alter the structure of hair.

(11) Instructor--An individual authorized by the department to offer instruction in any act or practice of cosmetology under Texas Occupations Code, §1602.002.

(12) Law and Rules Book--Texas Occupations Code, Chapters 1602 and 1603, and 16 Texas Administrative Code, Chapter 83.

(13) License--A department issued permit, certificate, approval, registration, or other similar permission required by law.

(14) License by reciprocity--A process that permits a cosmetology license holder from another jurisdiction or foreign country to obtain a Texas cosmetology license without repeating cosmetology education or examination license requirements.

(15) Manicurist--A manicurist may perform only those services defined in Occupations Code §1602.002(10) and (11).

(16) Operator--An individual authorized by the department to perform any act or practice of cosmetology under Texas Occupations Code, §1602.002.

(17) Provisional license--A license that allows a person to practice cosmetology in Texas pending the department's approval or denial of that person's application for licensure by reciprocity.

(18) Registered Examination Proctor--An individual authorized by the department to evaluate or grade a practical examination for the department for a license issued under Texas Occupations Code, Chapter 1602.

(19) Shampoo Apprentice--A person authorized to perform the practice of cosmetology as defined in §1602.002(3), relating to shampooing and conditioning a person's hair.

(20) Specialty Instructor--An individual authorized by the department to offer instruction in an act or practice of cosmetology limited to Texas Occupations Code, §1602.002(7), (9), and/or (10). Specialty instructors may only teach the subject matter in which they are licensed.

(21) Specialty Salon--A cosmetology establishment in which only the practice of cosmetology as defined in Texas Occupations Code, §1602.002(2), (4), (7), (9), or (10) is performed. Specialty salons may only perform the act or practice of cosmetology in which the salon is licensed.

(22) Weaving--The process of attaching, by any method, commercial hair (hair pieces, hair extensions) to a client's hair and/or scalp. Weaving is also known as hair integration or hair intensification.

(23) Wet disinfectant soaking container--A container with a cover to prevent contamination of the disinfectant solution and of a sufficient size such that the objects to be disinfected may be completely immersed in the disinfectant solution.

§83.20. License Requirements--Individuals.

(a) To be eligible for an operator license, facialist specialty license, manicurist specialty license, hair weaving specialty certificate, hair braiding specialty certificate, wig specialty certificate, or shampoo/conditioning specialty certificate, an applicant must:

(1) submit a completed application on a department-approved form;

(2) pay the fee required under §83.80;

(3) be at least 17 years of age;

(4) have obtained a high school diploma, or the equivalent of a high school diploma, or have passed a valid examination administered by a certified testing agency that measures the person's ability to benefit from training; and

(5) have completed the following hours of cosmetology curriculum in a beauty culture school:

(A) for an operator license, one of the following:

(i) 1500 hours of instruction in a beauty culture school; or

(ii) 1000 hours of instruction in beauty culture courses and 500 hours of related high school courses prescribed by the department in a vocational cosmetology program in a public school.

(B) for a facialist specialty license, 750 hours of instruction.

(C) for a manicurist specialty license, 600 hours of instruction.

(D) for a hair weaving specialty certificate, 300 hours of instruction completed in not less than eight weeks from date of enrollment.

(E) for a hair braiding specialty certificate, 35 hours of instruction.

(F) for a wig specialty certificate, 300 hours of instruction completed in not less than eight weeks from date of enrollment.

(G) for a shampoo/conditioning specialty certificate, 150 hours of instruction completed in not less than four weeks from date of enrollment ; and

(6) for an operator license, facialist specialty license, manicurist specialty license, hair weaving specialty certificate, wig specialty certificate, or shampoo/conditioning specialty certificate, pass a written and practical examination required under §83.21. No examination is required for a hair braiding specialty certificate.

(b) To be eligible for an instructor license, facial instructor specialty license or manicure instructor specialty license, an applicant must:

(1) pass a written examination and practical demonstration of teaching skills required under §83.21;

(2) be at least 18 years of age;

(3) have completed the 12th grade or its equivalent;

(4) pay the fee required under §83.80; and

(5) meet the following requirements:

(A) for an instructor license, hold an active operator license and have completed one of the following:

(i) 750 hours in methods of teaching the student; or

(ii) 250 hours in methods of teaching the student, if the applicant can verify two years of working experience in a licensed beauty salon.

(B) for a facial instructor specialty license, hold an active operator or facialist specialty license and have completed one of the following:

(i) 750 hours in methods of teaching the student; or

(ii) 250 hours in methods of teaching the student, if the applicant can verify two years of facial experience in a licensed beauty salon or facial specialty salon.

(C) for a manicure instructor specialty license, hold an active operator or manicurist specialty license and have completed one of the following:

(i) 750 hours of instruction in cosmetology courses and methods of teaching in a department-approved school or program, or

(ii) 250 hours in methods of teaching the student, if the applicant can verify two years of manicure experience in a licensed beauty salon or manicure specialty salon.

(c) To be eligible for a shampoo apprentice permit, an applicant must:

(1) be at least 16 years of age; and

(2) submit a completed application on a department-approved form.

(d) To be eligible for a student permit, an applicant must:

(1) submit a completed application on a department-approved form; and

(2) pay the fee required under §83.80.

(e) To be eligible for a registered examination proctor registration, an applicant must:

(1) have held an active instructor license for at least two of the five years preceding the application;

(2) hold an active instructor license;

(3) obtain a certificate of completion from a department-approved training course;

(4) submit a completed application on a department-approved form; and

(5) pay the applicable fee under §83.80.

(f) A license application is valid for one year from the date it is filed with the department.

§83.71. Responsibilities of Beauty Salons, Specialty Salons, Booth Rentals.

(a) Each establishment must have a copy of the current law and rules book.

(b) Each establishment is responsible for compliance with the health and safety standards of this chapter.

(c) Any alterations of a cosmetology establishment's floor plan must be done in accordance with this chapter and the Act.

(d) Salons may lease space to an independent contractor who holds a booth rental (independent contractor) license. The lessor to an independent contractor must maintain a list of all renters that includes the name of renter and the cosmetology license number of the renter. The lessor must supply the department inspector with a list of renters upon request.

(e) Each salon shall comply with the following requirements:

(1) a minimum of 150 square feet for the first licensee and not less than 30 square feet for each additional licensee. Dispensary, reception areas, restrooms, utility, heating and/or cooling facilities and retail floor space are not included as working floor space;

(2) a sink with hot and cold running water;

(3) an identifiable sign with the salon's name;

(4) a suitable receptacle for used towels/linen;

(5) one wet disinfectant soaking container;

(6) a clean, dry, debris-free storage area;

(7) a minimum of one covered trash container; and

(8) if providing manicure or pedicure nail services, a department-approved sterilizer.

(f) In addition to the requirements of subsection (e):

(1) beauty salons shall provide the following equipment for each licensee present and providing services:

(A) one working station;

(B) one styling chair;

(C) a sufficient amount of shampoo bowls; and

(D) one hand-held hair dryer or hood hair dryer, with or without chair.

(2) manicure salons shall provide the following equipment for each licensee present and providing services:

(A) one manicure table with light;

(B) one manicure stool; and

(C) one professional client chair for each manicure station.

(3) facial salons shall provide the following equipment for each licensee present and providing services:

(A) one facial couch/chair; and

(B) one mirror.

(4) combination manicure/facial salons shall provide the following equipment:

(A) the requirements for manicure salon; and

(B) the requirements for facial salon.

(5) wig salons shall provide the following equipment for each licensee present and providing services:

(A) one mannequin table, station, or styling bar to accommodate a minimum of 10 hairpieces;

(B) one wig dryer; and

(C) two canvas wig blocks.

(6) hair weaving/braiding salons shall provide the following equipment for each licensee present and providing services:

(A) one work station;

(B) one styling chair;

(C) a sufficient amount of shampoo bowls for licensees providing hair weaving services; and

(D) one chair dryer/handheld dryer for each three licensees providing hair weaving services.

(g) All booth rental (independent contractor) licensees must have the following items:

(1) one wet disinfectant soaking container;

(2) a clean, dry, debris-free storage area;

(3) a suitable receptacle for used towels/linen; and

(4) a current law and rules book.

(h) In addition to the requirements in subsection (g), booth rental (independent contractor) licensees must have the following items.

(1) If practicing in a beauty salon, one work station and one styling chair.

(2) If practicing in a facial salon, one facial couch or facial chair and one mirror, wall hung or hand held.

(3) If practicing in a manicure salon, one manicure table with a light, one manicure stool, and one chair, professional in appearance.

(i) Booth rental (independent contractor) licensees must comply with all state and federal laws relating to independent contractors.

(j) A booth rental (independent contractor) licensee may provide the cosmetology service(s) authorized by the independent contractor's cosmetology license.

(k) Cosmetology establishments shall display in the establishment, in a conspicuous place clearly visible to the public, a copy of the establishment's most recent inspection report issued by the department.

§83.72. Responsibilities of Beauty Culture Schools.

(a) Each establishment must have a copy of the current law and rules book.

(b) Each establishment is responsible for compliance with the health and safety standards of this chapter.

(c) Any alterations of a cosmetology establishment's floor plan must be done in accordance with this chapter and the Act.

(d) The curricula shall be posted in a conspicuous place in the school. A current syllabus and lesson plan for each course shall be maintained by the school and be available for inspection.

(e) Unless the context clearly indicates otherwise, when used in this section the term "student-instructor" shall mean a student permit holder who is enrolled in an instructor curriculum of a beauty culture school.

(f) Schools must have not less than one full-time licensed instructor on staff and on duty during business hours for each 25 students in attendance, including evening classes. A school may not enroll more than three student-instructors for each licensed instructor teaching in the school on a full-time basis. The student-instructor shall at all times work under the direct supervision of the full-time licensed instructor and may not service clients, but will concentrate on teaching skills. A licensed instructor must be physically present during all curriculum activities. No credit for instructional hours can be granted to a cosmetology student unless such hours are accrued under the supervision of a licensed instructor.

(g) Schools must maintain one album to display each student permit, including affixed picture, of each enrolled student. The permits shall be displayed in alphabetical order by last name, then alphabetical order by first name, and, if more than one student has the same name, by student permit number.

(h) Schools must use a time clock to track student hours and maintain a daily record of attendance with each student personally punching the time clock.

(i) Beauty culture schools shall post a sign at the time clock that states the following department requirements:

(1) Each student must clock in/out for himself/herself. No student may allow another person to clock in or out on behalf of that student.

(2) No credit shall be given for any times written in, except in a documented case of time clock failure or other situations approved by the department.

(3) If a student is in or out of the facility for lunch, he/she must clock out.

(4) Students leaving the facility for any reason, including smoke breaks, must clock out, except when an instructional area on a campus is located outside the approved facility, that area is approved by the department and students are under the supervision of a licensed instructor.

(j) Students are prohibited from preparing hour reports or supporting documents. Student-instructors may prepare hour reports and supporting documents; however only school owners and school designees, including licensed instructors, may electronically submit information to the department in accordance with this chapter. No student permit holder, including student-instructors, may electronically submit information to the department under this chapter.

(k) A school must properly account for the clock hours granted to each student. A school shall not engage in any act directly or indirectly that grants or approves student hours that are not accrued in accordance with this chapter. A school must maintain and have available for a department and/or student inspection the following documents for a period of the student's enrollment through 48 months after the student completes the curriculum, withdraws, or is terminated:

(1) daily record of attendance;

(2) student clock hours as demonstrated by the following documents:

(A) time clock record(s);

(B) time clock failure and repair record(s); and

(C) field trip records in accordance with §83.120(d)(5); and

(3) practical applications of the curriculum; and

(4) all other relevant documents that account for a student's accrued clock hours and practical applications under this chapter.

(l) At least one time per month, schools shall submit to the department an electronic record of each student's accrued clock hours in a manner and format prescribed by the department. A school's initial submission of clock hours shall include all hours accrued at the school. Upon graduation, a school shall affirm in an electronic manner and format prescribed by the department that a student completed the practical applications, if any, prescribed by the department's minimum standards or the school's published standards. Delayed data submission(s) are permitted only upon department approval, and the department shall prescribe the period of time for which a school may delay the electronic submission of data, to be determined on a case by case basis. Upon department approval, a school may submit data required under this subsection in an alternate manner and format as determined by the department, if the school demonstrates that the requirements of this subsection would cause a substantial hardship to the school.

(m) Except for a documented leave of absence, schools shall electronically submit a student's withdrawal or termination to the department within 10 calendar days after the withdrawal or termination. Except for a documented leave of absence, a school shall terminate a student who does not attend a cosmetology curriculum for 30 days.

(n) Public schools shall electronically submit a student's accrual of 500 hours in math, lab science, and English.

(o) All areas of a school or campus are acceptable as instructional areas for a public cosmetology school, provided that the instructor is teaching cosmetology curricula required under §83.120.

(p) A private cosmetology school may provide cosmetology instruction to public high school students by contracting with the Texas Education Agency and complying with Texas Education Agency law and rules. A public high school student receiving instruction at a private cosmetology school in accordance with a contract between the private cosmetology school and the Texas Education Agency is considered to be a public high school student enrolled in a public school cosmetology program for purposes of the Act and department rules.

(q) Schools may establish school rules of operation and conduct, including rules relating to absences and clothing, that do not conflict with this chapter.

(r) Beauty culture schools must have a classroom separated from the laboratory area by walls extending to the ceiling and equipped with the following:

(1) desks and chairs or table space for a minimum of 10 students (plus one desk or chair or table space for additional students enrolled an in attendance per theory class);

(2) charts covering, bones, muscles, nerves, skin, and nails;

(3) medical dictionary;

(4) minimum visual aid requirements: television and VCR or DVD;

(5) a dispensary of not less than 50 contiguous square feet with a double sink with hot and cold running water and space for storage and dispensing of supplies and equipment;

(6) six shampoo bowls and six shampoo chairs;

(7) eight heat processors or hand-held hair dryers;

(8) one heat cap or therapeutic light;

(9) eight dozen cold wave rods;

(10) three electric irons, or marcel stoves and irons;

(11) sixteen styling stations covered with a non-porous material that can be cleaned and disinfected, with mirror, and 16 styling chairs (swivel or hydraulic);

(12) twelve mannequins with sufficient hair with table or attached to styling stations;

(13) one day/date formatted computer time clock;

(14) one pair of professional hand clippers;

(15) three professional hand held dryers;

(16) four manicure tables and four stools;

(17) a suitable receptacle for used towels/linen;

(18) four covered trash cans in lab area;

(19) one large wet disinfectant soaking container;

(20) a clean, dry, debris-free storage area;

(21) if teaching facial courses:

(A) facial chair;

(B) magnifying lamp;

(C) woods lamp;

(D) dry sanitizer;

(E) steamer;

(F) brush machine for cleaning;

(G) vacuum machine that includes spray device;

(H) high frequency for disinfection, product penetration, stimulation;

(I) galvanic for eliminating encrustations, product penetration ;

(J) paraffin bath and paraffin wax; and

(22) if providing manicure or pedicure nail services, a department-approved sterilizer.

(s) Cosmetology establishments shall display in the establishment, in a conspicuous place clearly visible to the public, a copy of the establishment's most recent inspection report issued by the department.

§83.120. Technical Requirements--Curricula.

(a) Operator Curricula
Figure: 16 TAC §83.120(a)

(b) Specialist Curricula
Figure: 16 TAC §83.120(b)

(c) Instructor Curricula
Figure: 16 TAC §83.120(c)

(d) Practical Applications of the Curriculum
Figure: 16 TAC §83.120(d)

(e) Field Trips.

(1) Cosmetology related field trips are permitted under the following conditions for students enrolled in the following courses and the guidelines under this subsection must be strictly followed.

(2) A student may obtain the following field trip curriculum hours:

(A) a maximum of 75 hours out of the 1,500 hours operator course;

(B) a maximum of 50 hours out of the 1,000 hours operator course.

(C) a maximum of 30 hours for the manicure course;

(D) a maximum of 30 hours for the facial course; and

(E) a maximum of 30 hours for students taking the 750 hour instructor course.

(3) Unless provided by this subsection, field trips are not allowed for specialty courses.

(4) Students must be under the supervision of a licensed instructor from the school where the student is enrolled at all times during the field trip. The instructor-student ratio required in a school is required on a field trip.

(5) Complete documentation is required, including student names, instructor names, activity, location, date, and duration of the activity.

(6) No hours are allowed for travel.

(7) Prior department approval is not required.

(f) The changes in this section, as adopted by the commission on June 14, 2006, shall apply to students who enroll in a cosmetology school on or after September 1, 2006.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 12, 2006.

TRD-200603727
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: August 1, 2006
Proposal publication date: April 7, 2006
For further information, please call: (512) 463-7348

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PART 8. TEXAS RACING COMMISSION

CHAPTER 303. GENERAL PROVISIONS

SUBCHAPTER D. TEXAS BRED INCENTIVE PROGRAMS

DIVISION 2. PROGRAM FOR HORSES

16 TAC §303.93

The Texas Racing Commission (Commission) adopts an amendment to 16 TAC §303.93, relating to the Texas Bred Incentive Programs, without changes to the proposed text as published in the May 19, 2006, issue of the *Texas Register* (31 TexReg 4137) and will not be republished.

The adopted amendments to this section establishes the requirements and procedures related to the participation of Quarter Horses in the Texas Bred Incentive Programs. The purpose of the amendment is to encourage participation in the Texas Bred Incentive program for quarter horses, and to bring the rule into conformity with current practice at the Texas Quarter Horse Association (TQHA).

The adopted amendment changes the application due date in §303.93(b)(3)(B) for Accredited Texas Bred quarter horse stallions from January 31 to April 15 of the year in which an ATB eligible foal is conceived. This change will encourage participation in the Texas Bred Incentive Program for quarter horses by allowing owners a longer period of time to register their stallions without payment of a late fee. It will also bring the rule into conformity with current practice at TQHA, which already waives the late fee for stallion applications filed between January 31 and April 15.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Civil Statutes, Article 179e, §3.02 and §3.021, which authorizes the Commission to make rules relating to all aspects of greyhound and horse racing, and §9.01, which establishes that the rules of horse breed registries which establish the qualifications of Texas-bred horses are subject to rules adopted by the Commission.

The rule amendment affects Article 9 of Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 14, 2006.

TRD-200603764
Mark Fenner
General Counsel
Texas Racing Commission
Effective date: August 3, 2006
Proposal publication date: May 19, 2006
For further information, please call: (512) 490-4009

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CHAPTER 321. PARI-MUTUEL WAGERING
SUBCHAPTER C. REGULATION OF LIVE WAGERING
DIVISION 2. DISTRIBUTION OF PARI-MUTUEL POOLS

16 TAC §321.310, §321.314

The Texas Racing Commission (Commission) adopts amendments to 16 TAC §321.310 and §321.314, relating to the minimum number of different wagering interests that must be present in a race before an association may offer Trifecta and Superfecta wagers on that race. The amendments are adopted with changes to the proposed text as published in the May 19, 2006, issue of the *Texas Register* (31 TexReg 4138).

The sections establish the requirements and procedures related to the offering of Trifecta and Superfecta pari-mutuel wagers on horse and greyhound races. The purpose of the adoption is to increase the number of wagering opportunities for the public, increase the size of the mutuel handle, and increase the size of the purse.

The adopted amendment to §321.310 allows an association to offer Trifecta wagering on races with fewer than six different wagering interests if approved by the board of stewards or judges (the "board"). It assigns to the board the responsibility for determining whether to cancel the wager and refund the pool in the event that scratches reduce the number of different wagering interests below six, or below the amount previously approved by the board.

The adopted amendment to §321.314 allows an association to offer Superfecta wagering on races with fewer than seven different wagering interests if approved by the board. It assigns to the board the responsibility for determining whether to cancel the wager and refund the pool in the event that scratches reduce the number of different wagering interests below seven, or below the amount previously approved by the board.

The Commission received one comment from an individual opposing adoption of these rule amendments. The commenter expressed concern that allowing Trifecta and Superfecta wagers on races with reduced numbers of different wagering interests created opportunities for jockeys to fix races. The Commission agrees in part with the commenter's concerns, and disagrees in part. The Commission agrees that allowing boards to reduce the number of different wagering interests by two or more creates an undue risk of manipulation, but disagrees that it should prohibit any reduction. The Commission recognizes the professionalism of the boards and supports their ability to identify and punish any jockeys who attempt to fix races. The Commission also recognizes the legitimate business needs of the associations and supports their efforts to increase wagering interest in races with smaller field sizes. Therefore, the Commission adopts changes that prohibit boards from approving Trifecta wagers in races with fewer than five different wagering interests, and from approving Superfecta wagers in races with fewer than six different wagering interests.

The amendments are adopted under the Texas Civil Statutes, Article 179e, §3.02 and §3.021, which authorizes the Commission to make rules relating to all aspects of greyhound and horse racing, and §11.01, which requires the Commission to adopt rules regulating pari-mutuel wagering on greyhound and horse racing.

The rule amendments affect Article 11 of Texas Civil Statutes, Article 179e.

§321.310. Trifecta.

(a) The trifecta wager is not a parlay and has no connection with or relation to the win, place, and show pool shown on the tote board. All tickets on the trifecta shall be calculated as a separate pool.

(b) A person purchasing a trifecta ticket must select the three animals in a race which will finish first, second, and third and designate the exact order in which the first three will finish.

(c) If after wagering has begun an animal entered in a trifecta race is scratched or otherwise prevented from racing, all money wa-

gered on the affected animal shall be deducted from the trifecta pool and refunded to the holders of tickets on the affected animal.

(d) If no ticket is sold on the winning combination, the net pool shall be distributed equally among the holders of tickets selecting the animals finishing first and second.

(e) If no ticket is sold that requires distribution under subsection (d) of this section, the net pool shall be distributed equally among the holders of tickets selecting the animals finishing first and third.

(f) If no ticket is sold that requires distribution under subsections (d) or (e) of this section, the net pool shall be distributed equally among the holders of tickets selecting the animal finishing first.

(g) If no ticket is sold requiring distribution under subsections (d) - (f) of this section, the net pool shall be distributed equally among the holders of tickets selecting the animals finishing second and third.

(h) If no ticket is sold requiring distribution under subsections (d) - (g) of this section, the net pool shall be distributed equally among the holders of tickets selecting the animal finishing second.

(i) If no ticket is sold requiring distribution under subsections (d) - (h) of this section, the net pool shall be distributed equally among the holders of tickets selecting the animal finishing third.

(j) If a trifecta race ends in a dead heat for first place, the winning combination shall include the first two animals as finishing in either first or second and the animal finishing third. If a trifecta race ends in a dead heat for second place, the winning combinations shall include the animal finishing first and the two animals finishing in a dead heat as finishing either second or third. If a trifecta race ends in a dead heat for third place, the winning combinations include the animals finishing first and second and any of the animals finishing in the dead heat as finishing third. In all combinations paid under this subsection, the net pool shall be divided into separate pools, calculated as a place pool, and paid out accordingly.

(k) If a trifecta race ends in a triple dead heat or double dead heats, the net pool shall be divided by the number of all win, place, and show combinations formed, calculated as separate pools, and paid out accordingly.

(l) If no ticket is sold that would require distribution under this section, the trifecta is considered "no contest" and the association shall carry forward all money wagered in the trifecta pool to the next consecutive trifecta pool.

(m) An association shall not offer trifecta wagering on any race placed on the official program that does not have six or more different wagering interests unless approved by the board of stewards or judges. The board of stewards or judges may not approve a Trifecta wager in a race with fewer than five wagering interests.

(n) In the event scratches after the animals leave the paddock cause the number of different wagering interests to fall below six, or below an amount previously approved by the board of stewards or judges, the board of stewards or judges may order the wager to be canceled and the pool to be refunded if deemed in the interest of wagering integrity.

§321.314. Superfecta.

(a) The superfecta is not a parlay and has no connection with or relation to the win, place, and show pools shown on the tote board. All tickets on the superfecta shall be calculated as a separate pool.

(b) A person purchasing a superfecta ticket shall select the four animals that will finish first, second, third, and fourth in one race. The pool shall be distributed only to the holders of tickets that select the same order of finish as officially posted.

(c) If no superfecta ticket is sold for the winning combination, the pool shall be distributed to the holders of tickets selecting the win, place, and show finishers. If no ticket is sold combining the win, place, and show finishers, the pool shall be distributed to the holders of tickets selecting the win and place finishers. If no ticket is sold combining the win and place finishers, the pool shall be distributed to the holders of tickets selecting the winner. If less than four animals finish and the race is declared official by the stewards or racing judges, the pool shall be distributed to holders of tickets selecting the finishing animals in order, ignoring the balance of the selection.

(d) In the event of a dead heat, all superfecta tickets selecting the correct order of finish, counting an animal in a dead heat as finishing in either position dead heated, shall be winning tickets. The pool shall be distributed as a place pool.

(e) If an animal is scratched in a superfecta race, a superfecta ticket may not be exchanged. All tickets which include a scratched animal shall be eliminated from further participation in the superfecta pool and shall be refunded.

(f) If the superfecta pool cannot otherwise be distributed in accordance with this section, the money in the superfecta pool shall be carried forward to the next consecutive superfecta pool.

(g) An association shall not offer Superfecta wagering on any race placed on the official program that does not have seven or more different wagering interests unless approved by the board of stewards or judges. The board of stewards or judges may not approve a Superfecta wager in a race with fewer than six wagering interests.

(h) In the event scratches after the animals leave the paddock cause the number of different wagering interests to fall below seven, or below an amount previously approved by the board of stewards or judges as outlined in subsection (g) of this section, the board of stewards or judges may order the wager to be canceled and the pool to be refunded if deemed in the interest of wagering integrity.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 14, 2006.

TRD-200603763
Mark Fenner
General Counsel
Texas Racing Commission
Effective date: August 3, 2006
Proposal publication date: May 19, 2006
For further information, please call: (512) 490-4009

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TITLE 19. EDUCATION

PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 230. PROFESSIONAL EDUCATOR PREPARATION AND CERTIFICATION

SUBCHAPTER N. CERTIFICATE ISSUANCE PROCEDURES

19 TAC §230.436

The State Board for Educator Certification (SBEC) adopts an amendment to §230.436, relating to certification fees. The amendment is adopted without changes to the proposed text as published in the March 31, 2006, issue of the *Texas Register* (31 TexReg 2786) and will not be republished.

The section establishes the schedule of fees for certification services. The adopted amendment provides clarification regarding the fee for issuance of the Temporary Teacher certificate and establishes a fee for the issuance of the Visiting International Teacher certificate.

With the exception of technical edits, the adopted amendment reflects rule action adopted by the SBEC in 2005. Specifically, the adopted amendment adds new paragraph (21) to set a fee of $50 for issuance of the Visiting International Teacher certificate. The new Visiting International Teacher certificate was approved by the SBEC at its October 13, 2004, meeting. However, the rule creating the new certificate (19 TAC §232.6) did not set a fee for certificate issuance. The new Visiting International Teacher certificate ensures that participants in recognized exchange programs are highly qualified and meet the requirements of the No Child Left Behind Act. The new certificate replaces permits for Exchange Teachers (19 TAC §230.510) and permits for Teachers for Bilingual Education Programs (19 TAC §230.511) which do not comply with the requirements of the No Child Left Behind Act.

The adopted amendment also removes language in paragraph (11) to clarify that the Temporary Teacher certificate may be issued only based on recommendation by an approved Texas public school district.

Additional non-substantive, technical edits are also made to this section.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the following Texas Education Code sections: §21.031(a), which vests the SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; §21.041(b)(2), which requires the SBEC to specify the classes of certificates to be issued; §21.041(b)(4), which requires the SBEC to specify the requirements for the issuance and renewal of an educator certificate; §21.041(b)(5), which requires the SBEC to provide for the issuance of an educator certificate to a person who holds a similar certificate issued by another state or foreign country, subject to §21.052; and §21.041(c), which requires the SBEC to propose a rule adopting a fee for the issuance and maintenance of an educator certificate that is adequate to cover the cost of administration of this subchapter.

The adopted amendment implements Texas Education Code, §§21.031(a), 21.041(b)(1), (2), (4), and (5), and 21.041(c).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 11, 2006.

TRD-200603684

Raymond Glynn

Deputy Associate Commissioner, Educator Certification and Standards

State Board for Educator Certification

Effective date: July 31, 2006

Proposal publication date: March 31, 2006

For further information, please call: (512) 475-1497

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CHAPTER 233. CATEGORIES OF CLASSROOM TEACHING CERTIFICATES

19 TAC §233.2

The State Board for Educator Certification (SBEC) adopts an amendment to §233.2, relating to categories of classroom teaching certificates. The amendment is adopted without changes to the proposed text as published in the March 31, 2006, issue of the *Texas Register* (31 TexReg 2793) and will not be republished.

The section addresses generalist certificates. The adopted amendment extends the timeline of the rule to the 2006 - 2007 school year, including summer school 2007.

In consideration of the continued issues regarding the availability and assignment of certified educators to teach in the hard-to-fill vacancies in Grades 5 and 6, the adopted amendment modifies subsection (c) to extend to the 2006 - 2007 school year the provision allowing school districts the flexibility of hiring teachers who hold Generalist Early Childhood-Grade 4 certificates for self-contained classrooms for Grades 5 and 6. The expiration date of the provision reflected in subsection (c)(4) is also extended in order to include summer school programs in 2007. Minor technical edits are also made throughout the section.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the following Texas Education Code sections: §21.031(a), which vests the SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; and §21.041(b)(2), which requires the SBEC to specify the classes of certificates to be issued.

The adopted amendment implements Texas Education Code, §21.031(a) and §21.041(b)(1) - (2).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 11, 2006.

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Raymond Glynn

Deputy Associate Commissioner, Educator Certification and Standards

State Board for Educator Certification

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For further information, please call: (512) 475-1497

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CHAPTER 249. DISCIPLINARY PROCEEDINGS, SANCTIONS, AND CONTESTED CASES INCLUDING ENFORCEMENT OF THE EDUCATOR'S CODE OF ETHICS

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §249.2

The State Board for Educator Certification (SBEC) adopts the repeal of §249.2, relating to the sunset provision for disciplinary proceedings, sanctions, and contested cases including enforcement of the educator's code of ethics. The repeal is adopted without changes to the proposal as published in the March 31, 2006, issue of the *Texas Register* (31 TexReg 2799) and will not be republished.

The section establishes a sunset provision for 19 TAC Chapter 249 four years from its initial effective date unless readopted or amended by the SBEC before then. The adopted repeal removes this sunset provision from rule.

The rules in 19 TAC Chapter 249 were adopted with an effective date of March 31, 1999 (24 TexReg 2304). The review of 19 TAC Chapter 249, including §249.2, was completed in January 2001. 19 TAC §249.2 was intended to fulfill the requirement in Government Code, §2001.039, that state agencies periodically review their rules. However, the Government Code provision requiring the periodic review of the agency rules did not mandate or authorize the automatic expiration of the rules.

The Government Code, §2001.039, does require state agencies to periodically review their rules, but the Government Code does not provide that agency rules that do not go through the review process will expire. In fact, Government Code, §2001.040, provides a procedure for addressing an agency's failure to follow certain procedural requirements, for a rule proposal and adoption, found in §2001.0225 through §2001.034.

Government Code, §2001.039, does not mandate or authorize the automatic expiration of agency rules in the event that the rules are not readopted within the four-year rule review cycle contemplated by §2001.039. Accordingly, the provision in 19 TAC §249.2 has no effect on the expiration of the rules in 19 TAC Chapter 249 because Government Code, §2001.039, does not provide sufficient authority to adopt this type of sunset provision into rule. Such a provision is unenforceable due to insufficient statutory basis to adopt. However, on the advice of legal counsel, the SBEC re-affirmed all the decisions and orders issued pursuant to 19 TAC Chapter 249 in order to clarify the SBEC's intent that 19 TAC §249.2 operates only as a reference to the review of rules required under the Government Code, §2001.039.

At its March 3, 2006, meeting, the SBEC also took action to incorporate the rule review provisions from the Government Code, §2001.039, into the SBEC operating procedures. This implements the SBEC's intent to review all its rules to ensure that there is current statutory authority for each agency rule, in accordance with Government Code requirements. The SBEC also voted to reaffirm any actions taken under 19 TAC Chapter 249, including any actions taken until the effective date of the repeal of 19 TAC §249.2, in order to clarify the SBEC's intent that 19 TAC §249.2 operates only as a reference to the review of rules required under the Government Code, §2001.039.

No comments were received regarding adoption of the repeal.

The repeal is adopted under the following Texas Education Code sections: §21.031(a), which vests the SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; §21.041(b)(7), which requires the SBEC to provide for disciplinary proceedings, including the suspension or revocation of an educator certificate, as provided by Chapter 2001, Government Code; and §21.041(b)(8), which requires the SBEC to provide for the adoption, amendment, and enforcement of an educator's code of ethics.

The adopted repeal implements Texas Education Code, §21.031(a) and §21.041(b)(1), (7), and (8).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200603686

Raymond Glynn

Deputy Associate Commissioner, Educator Certification and Standards

State Board for Educator Certification

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For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 7. STATE COMMITTEE OF EXAMINERS IN THE FITTING AND DISPENSING OF HEARING INSTRUMENTS

CHAPTER 141. FITTING AND DISPENSING OF HEARING INSTRUMENTS

22 TAC §§141.1 - 141.24

The State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments (committee) adopts amendments to §§141.1 - 141.24, concerning the licensure and regulation of hearing instrument fitters and dispensers. Amendments to §141.2 and §141.16 are adopted with changes to the proposed text as published in the January 13, 2006, issue of the *Texas Register* (31 TexReg 222). Amendments to §§141.1, 141.3 - 141.15, and 141.17 - 141.24 are adopted without changes, and the sections will not be republished.

BACKGROUND AND PURPOSE

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 141.1 - 141.24 have been reviewed and the committee has determined that the reasons for adopting the sections continue to exist because rules relating to the licensure and regulation of hearing instrument fitters and dispensers are needed in order to protect and promote public health, safety, and welfare.

The amendments are the result of the comprehensive rule review undertaken by the committee and the committee's staff. In general, each section was reviewed and amended in order to ensure clarity; to ensure that the rules reflect current legal, policy, and operational considerations; to ensure accuracy; to improve draftsmanship; and to make the rules more accessible, understandable, and usable, to the extent possible.

SECTION BY SECTION SUMMARY

The amendments to §§141.1, 141.4 - 141.6, 141.9, 141.10, 141.12, 141.19, 141.20, 141.23, and 141.24 improve draftsmanship; delete obsolete language; and reflect current operating procedures.

Amendments to §141.2 reflect changes in terminology from "Certification of testing equipment" to "Certification, proof of" adding the definition as a means to clarify the intent of the rules; and modify the definition of "department" to reflect the current name of the agency.

Amendments to §141.3 are adopted to clarify the purpose of each standing subcommittee; to clarify that the executive director is the custodian of the committee's records; to correct inaccurate language; and to improve draftsmanship.

Amendments to §141.7 are adopted to reflect current operating procedure; to eliminate references to requiring notarization of documents; to improve draftsmanship; and to delete unnecessary language.

Amendments to §141.8 are adopted to eliminate references to requiring notarization of documents and to improve draftsmanship.

The amendment to §141.11 is adopted to eliminate the option of filing a cash deposit with the committee. A deposit or negotiable security may not be in cash.

Amendments to §141.13 are adopted to delete unnecessary language; to improve draftsmanship; to reflect two-year license terms; to provide for electronic license renewal forms; to clarify that certification of testing equipment and continuing education documentation shall be submitted only if selected for audit; and to require that licensees maintain continuing education and certification of testing equipment documentation for a period of three years.

Amendments to §141.14 are adopted to delete unnecessary language; to update language relating to two year license terms; to move language relating to credit for publications to a more appropriate subsection; and to clarify expectations regarding the submission of continuing education documentation at the time of audit. The amendment to §141.14(b)(3) provides for the acceptance of no more than 5 contact hours annually of online continuing education courses and manufacturer continuing education courses.

Amendments to §141.15(d) are adopted to require that a person who fails the examination must repeat the hours of direct supervision required for the sections that were failed and to eliminate the requirement that a person may only take the examination three times.

Amendments to §141.16 are adopted to improve draftsmanship; to delete unnecessary language; to require that it is the responsibility of the owner of the dispensing practice to maintain client records; to reduce the time period for maintaining records from five to three years after the latest date of fitting and dispensing of hearing instruments; and to clarify standards for audiometric testing devices and submission of proof of certification of testing equipment.

Amendments to §141.17 are adopted to improve draftsmanship; to delete unnecessary language; to update language to reflect current legal, policy, and operational considerations; to clarify that all disciplinary action and license or application denial proposals shall be followed by written notice of violation and option for formal hearing; to provide that the executive director may accept a complaint that is not on the official form; and to set out procedures relating to the surrender of a license after a complaint has been filed.

Amendments to §141.18 are adopted to improve draftsmanship and clarify the section's purpose.

Amendments to §141.21 are adopted to delete unnecessary language and update the section title to accurately reflect its contents.

Amendments to §141.22 are adopted to delete unnecessary language, to improve draftsmanship, to clarify the prohibition on sexual activity with clients, and to require compliance with the Health Insurance Portability and Accountability Act of 1996.

COMMENTS

The department, on behalf of the commission, has reviewed the prepared responses to verbal and written comments received during the comment period regarding the rule amendments, which the commission has reviewed and accepts. Why is this necessary? The legal authority to review and respond to comments lies with the committee not the agency or the commission. A total of 519 comments were received in the form of letters, signatures on petitions, and signatures on form letters. Of those, 518 commenters were individuals or businesses. One commenter was Texas Hearing Aid Association. Commenters were generally neutral or in favor of the rule proposal as a whole, but expressed concerns, asked questions, and made recommendations. Some commenters did express opposition to specific provisions, as described in this preamble.

Comment: Regarding §141.2(7), one commenter noted that the committee proposed a definition of "certification of testing equipment" but that phrase does not appear in the rules. The commenter rightly noted that the new definition was proposed based on the amendment to §141.16(f)(2) which refers to "proof of certification." The commenter recommends that "certification of testing equipment" be replaced with "proof of certification."

Response: The committee agreed. In the interest of maintaining alphabetical order within the definitions, the committee has replaced "certification of testing equipment" with "certification, proof of".

Comment: Regarding §141.2(22), one commenter recommended that the committee add language to the definition of "sell or sale" that the commenter believes would clarify that licensed dispensers from other states may sell hearing instruments by mail order to Texas customers. Additionally, 413 persons signed and mailed to the committee form letters endorsing this recommendation.

Response: The committee engaged in significant dialogue with the commenter and disagreed with the commenter's recommendation. Section 141.2(22) was not proposed for modification. The committee also notes that the language of the statute in Texas Occupations Code, §402.451(a)(7), appears to prohibit the sale of a hearing instrument by mail. As a means to clarify

this topic, the committee will seek an opinion from the office of the Attorney General regarding the applicability of Texas Occupations Code, §402.451(a)(7) to licensed dispensers from other states who sell hearing instruments by mail order. No change was made as a result of this comment.

Comment: Regarding §141.16(c)(12), one commenter opposes the amendment as written and requests that the committee not adopt the rule. The commenter stated that no change in the original contract should be required after its issuance because most clients fail to bring their copy of the contract on return visits. The commenter states that the current rule has created no problems for license holders. Additionally, the commenter states that the rule is micromanagement by regulation and is intended to mirror requirements relating to licensed audiologists, both of which are unnecessary. The commenter offered a proposed amendment to §141.16(b)(3) that would carry out the intent of the proposed rule if the committee chooses not to accept the commenter's recommendation that §141.16(c)(12) not be adopted or if the committee wishes to pursue the intent of the proposed rule.

Response: The committee agrees that §141.16(c)(12) should not be adopted as written. This matter will be studied for possible future rule amendments. Section 141.16(c)(12) is not adopted and has been deleted, and conforming punctuation changes are adopted and added to §141.16(c)(11).

Comment: Regarding §141.16(f)(2), one commenter opposes the rules as written and maintains that the rules will cause confusion for license holders, as the rule does not specify which pieces of equipment are referred to in the rule. The commenter opposes the amendment to this rule, but also offered alternate acceptable language. The commenter notes that the statute has not changed and states that if the committee is broadening the rule's scope to include equipment not used in the hearing evaluation, that the additional equipment should be specified and an explanation for the change should be given to license holders. The commenter states that if the phrase "used in the hearing evaluation" were added to the amended rule, that addition would clarify the rule.

Another commenter opposed the rule for similar reasons and stated that the rule should only apply to audiometers used to test hearing.

Response: The committee notes that the proposed rule mirrors the language of the statute. However, the committee agrees with the commenter's position and has added the phrase "used in the hearing evaluation" to the text of §141.16(f)(2).

Comment: Regarding §141.14(b)(3), one commenter recommends that the rule be modified to allow 5 hours of online continuing education, 5 hours of manufacturer-sponsored continuing education, and 10 hours of non-manufacturer sponsored continuing education.

Additionally, a total of 105 persons wrote letters or signed petitions expressing opposition to the rule limiting online continuing education and recommending that there be no limit on the number of hours that can be earned through online continuing education experiences. Two commenters stated their belief that the committee's rule is for the benefit of groups who offer classroom continuing education and questioned the committee's rationale for limiting online continuing education.

Response: The committee disagrees and believes that the proposed amendment allowing for a total of 5 hours of online and manufacturer-sponsored continuing education, with a balance of 15 hours of non-manufacturer sponsored continuing education, is an appropriate rule which will ensure quality continuing education of Texas licensed fitters and dispensers of hearing instruments. No change was made as a result of the comment.

Comment: Regarding §141.14(b)(3), one commenter recommends using the term "electronic learning" instead of "online" when referring to continuing education experiences.

Response: The committee disagrees, as the proposed term may be too broad. No change was made as a result of the comment.

Comment: Regarding §141.14(b)(3), one commenter supports the rule and believes that failure to limit online continuing education hours as proposed will result in dominance by manufacturers in this area and a lowering of the quality of continuing education for license holders. The commenter expresses concerns regarding abuse of online continuing education indicating the length of time that a program may remain available online, the number of times that a license holder may take the same online course, the number of hours to be awarded to an online course, and verification of completion of online courses.

Response: The committee agrees with the commenter that §141.14(b)(3) should be adopted and notes that the commenter originally proposed the rule to the committee at a stakeholder rule review meeting. The committee notes that other allied health occupational regulatory bodies allow all or part of the continuing education requirement to be completed online and believes that its rule is appropriate. No change was made as a result of this comment.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Cathy Campbell, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the committee's legal authority.

STATUTORY AUTHORITY

The adopted amendments are authorized by Occupations Code, §402.102, which authorizes the committee to adopt rules necessary for the performance of its duties. The review of the rules implements Government Code, §2001.039.

§141.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--Texas Occupations Code, Chapter 402, concerning the licensing of persons authorized to fit and dispense hearing instruments.

(2) Administrative Law Judge--A judge employed by the State Office of Administrative Hearings.

(3) APA--Administrative Procedure Act, the Government Code, Chapter 2001.

(4) Applicant--A person who applies for licensure under the Act.

(5) Apprentice permit--A permit issued by the committee to a person who meets the requirements of Texas Occupations Code, §402.207.

(6) Bill of sale--See definition for "written contract for services."

(7) Certification, proof of--A certificate of calibration, compliance, conformance, or performance.

(8) Committee--The State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments.

(9) Contact hour--A period of time equal to 55 minutes.

(10) Contract--See definition for "written contract for services."

(11) Contested case--A proceeding in accordance with Administrative Procedure Act (APA) in this chapter, including but not restricted to rule enforcement and licensing, in which the legal rights, duties, or privileges of a party are to be determined by the committee after an opportunity for an adjudicative hearing.

(12) Continuing education--Education intended to maintain and improve the quality of professional services in the fitting and dispensing of hearing instruments, to keep licensees knowledgeable of current research, techniques, and practices, and provide other resources which will improve skills and competence in the fitting and dispensing of hearing instruments.

(13) Department--Department of State Health Services.

(14) Direct supervision--The physical presence with prompt evaluation, review and consultation of a supervisor anytime a temporary training permit holder is engaged in the act of fitting and dispensing of hearing instruments.

(15) Fitting and dispensing hearing instruments--The measurement of human hearing by the use of an audiometer, or by any means, for the purpose of making selections, adaptations, or sales of hearing instruments. The term includes the making of impressions for earmolds to be used as a part of the hearing instrument and any necessary post-fitting counseling for the purpose of fitting and dispensing hearing instruments.

(16) Formal hearing--A hearing or proceeding in accordance with this chapter, including a "contested case" as defined in this section.

(17) Indirect supervision--The daily evaluation, review, and prompt consultation of a supervisor anytime a permit holder is engaged in the act of fitting and dispensing hearing instruments.

(18) License--A license issued by the committee under Texas Occupations Code, Chapter 402, and this chapter to a person authorized to fit and dispense hearing instruments.

(19) Licensee--Any person licensed by the committee.

(20) Ownership of dispensing practice--A person who owns, maintains, or operates an office or place of business where the person employs or engages under contract a person who practices the fitting and dispensing of hearing instruments shall be considered also to be engaged in the practice of fitting and dispensing of hearing instruments under this Act.

(21) Person--An individual, corporation, partnership, or other legal entity.

(22) Sell or sale--A transfer of title or the right to use by lease, bailment, or any other contract. For the purpose of Texas Occupations Code, §402.001(7), the term "sell" or "sale" shall not include sales at wholesale by manufacturers to persons licensed under this Act, or to the distributors for distribution and sale to persons licensed under Texas Occupations Code, §402.001(7), and this chapter.

(23) Selling of hearing instrument by mail--Anytime a hearing instrument is not sold, fitted or dispensed in person by a licensee or permit holder.

(24) Specific Product--Specific product shall include, but not be limited to, brand name, model number, shell type, and circuit type.

(25) Sponsor--Provider of a continuing education activity.

(26) Supervisor--A supervisor is a person licensed by the committee as a licensed hearing instrument dispenser who:

(A) meets the qualifications established by Texas Occupations Code, §402.255 and this chapter;

(B) has an established place of business;

(C) is responsible for direct and indirect supervision and available for consultation and education of a temporary training permit holder; or

(D) is responsible for indirect supervision and available for consultation of an apprentice permit holder.

(27) Temporary training permit--A permit issued by the committee to persons authorized to fit and dispense hearing instruments only under the direct or indirect supervision as appropriate of a person who holds a license under Texas Occupations Code, Chapter 402, and this chapter.

(28) Working days--Working days are Monday through Friday, 8:00 a.m. to 5:00 p.m.

(29) Written contract for services--A written agreement or bill of sale, between the licensee and purchaser of a hearing instrument as set out in §141.16(c) of this title (relating to Conditions of Sale).

(30) 30-day trial period--The period in which a person may cancel the purchase of a hearing instrument.

§141.16. Conditions of Sale.

(a) Compliance with other state and federal regulations.

(1) A licensee or permit holder shall adhere to the Federal Food and Drug Administration regulations in accordance with 21 Code of Federal Regulations (CFR) §801.420 and §801.421.

(2) A licensee or permit holder shall receive a written statement before selling a hearing instrument that is signed by a physician or surgeon duly licensed by the Texas Medical Board who specializes in diseases of the ear. The written statement shall confirm that the client's hearing loss has been medically evaluated during the preceding six-month period and that the client is age 18 or older. The licensee may inform the client that the medical evaluation requirement may be waived as long as the licensee:

(A) informs the client that the exercise of the waiver is not in the client's best health interest;

(B) does not encourage the client to waive the medical evaluation; and

(C) gives the client an opportunity to sign a statement on the contract that says: "I have been advised by (licensee's or permit holder's name) that the Food and Drug Administration has determined that my best health interest would be served if I had a medical evaluation by a licensed physician (preferably a physician or surgeon who specializes in diseases of the ear) before purchasing one or more hearing instruments. I do not wish to receive a medical evaluation before purchasing a hearing instrument".

(3) A licensee or permit holder shall not sell a hearing instrument to a person under 18 years of age unless the prospective user, parent, or guardian has presented to the licensee or permit holder a written statement signed by a licensed physician specializing in diseases of the ear that states that the client's hearing loss has been medically

evaluated and the client may be considered a candidate for a hearing instrument. The evaluation must have taken place within the preceding six months.

(4) A licensee or permit holder shall advise clients who appear to have any of the following otologic conditions to consult promptly with a physician:

(A) visible, congenital or traumatic deformity of the ear;

(B) history of active drainage from the ear within the previous 90 days;

(C) history of sudden or rapidly progressive hearing loss within the previous 90 days;

(D) acute or chronic dizziness;

(E) unilateral hearing loss of sudden or recent onset within the previous 90 days;

(F) audiometric air-bone gap equal to or greater than 15 decibels at 500 hertz (Hz), 1,000 Hz, and 2,000 Hz;

(G) visible evidence of significant cerumen accumulation or a foreign body in the ear canal; and

(H) pain or discomfort in the ear.

(b) Guidelines for a 30-day trial period.

(1) All clients shall be informed of a 30-day trial period by written contract for services and all charges associated with such trial period be included in this written contract for services, which shall include the name, address, and telephone number of the State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments.

(2) Any client purchasing one or more hearing instruments shall be entitled to a refund of the purchase price advanced by the client for the hearing instrument(s), less the agreed-upon amount associated with the trial period, upon return of the instrument(s), in good condition to the licensee within the 30-day trial period ending 30 days from the date of delivery. Should the order be canceled by the client prior to the delivery of the hearing instrument(s), the licensee may retain the agreed-upon charges and fees as specified in the written contract for services. The client shall receive the refund due no later than the 30th day after the date on which the client cancels the order or returns the hearing instrument(s), in good condition, to the licensee.

(3) Should the hearing instrument(s) have to be repaired, remade or adjusted during the 30-day trial period, the 30-day trial period is suspended for one day for each 24 hour period that the hearing instrument(s) is not in the client's possession. The 30-day trial period resumes on the day the client reclaims the repaired remade, or adjusted hearing instrument. If the hearing instrument is not picked up within five working days following client notification, the 30-day trial period resumes.

(c) Written contract for services to client - client protection. Upon the sale of any hearing instrument(s) or change of model or serial number of the hearing instrument(s), the licensee or permit holder shall provide the client with a signed, written contract for services containing the following:

(1) the date of sale;

(2) the make and model of the hearing instrument(s);

(3) the name, address, and telephone number of the principal place of business of the licensee;

(4) a statement that the hearing instrument is new, used, or reconditioned;

(5) the length of time and other terms of the guarantee and by whom the hearing instrument is guaranteed;

(6) a copy of the written forms (relating to waiver forms);

(7) a statement on or attached to the written contract for services, in no smaller than 10-point bold type, as follows: "The client has been advised at the outset of his relationship with the undersigned fitter and dispenser of hearing instruments that any examination or representation made by a licensed fitter and dispenser of hearing instruments in connection with the fitting and selling of the hearing instrument(s) is not an examination, diagnosis or prescription by a person duly licensed and qualified as a physician or surgeon authorized to practice medicine in the State of Texas and, therefore, must not be regarded as medical opinion or advice";

(8) a statement on the face of the written contract for services, in no smaller than 10-point bold type, as follows: "If you have a complaint against a licensed fitter and dispenser of hearing instruments, you may contact the State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments, 1100 West 49th Street, Austin, Texas 78756-3183, telephone 1-800-942-5540";

(9) the licensee's or permit holder's printed name, signature and license or permit number;

(10) the supervisory arrangement reflected on a written contract for services by signature of both the permit holder and licensee with both the permit holder's license number and the licensee's license number; and

(11) a serial number(s) and follow-up appointment within 30 days after the hearing instrument fitting shall be part of the patient records.

(d) Terms of sale.

(1) There shall be a full and complete disclosure of the cost of financing the purchase of hearing instruments.

(2) If the initial price of the hearing instrument(s) furnished is reduced by trade-in allowance or discount, the written contract for services shall conspicuously state:

(A) the initial price of the aid before trade-in allowance or discount;

(B) the amount of the trade-in allowance or discount; and

(C) the final price to the consumer.

(e) Record keeping.

(1) The owner of the dispensing practice shall ensure that records are maintained on every client who receives services in connection with the fitting and dispensing of hearing instruments. Such records shall be preserved for at least three years after the fitting and dispensing of the hearing instrument(s) to the client. If other hearing instruments are subsequently fitted and dispensed to that client, cumulative records must be maintained for at least three years after the latest fitting and dispensing of the hearing instrument(s) to that client. The records must be available for the committee's inspection and shall include but not be limited to the following:

(A) pertinent case history;

(B) source of referral and appropriate documents;

(C) medical evaluation or waiver of evaluation;

(D) copies of written contracts for services and receipts executed in connection with the fitting and dispensing of each hearing instrument provided;

(E) a complete record of hearing tests, and services provided, including follow-up appointment within the 30-day trial period; and

(F) all correspondence specifically related to services provided to the client or the hearing instrument(s) fitted and dispensed to the client.

(2) A complete record of tests shall be available for the client.

(f) Audiometers and audiometric testing devices.

(1) Audiometers and audiometric testing devices shall meet the current standards of the American National Standards Institute or the International Electrotechnical Commission (IEC).

(2) All portable and stationary testing equipment used in the hearing evaluation by the license holder must be calibrated annually and proof of certification must be provided upon renewal of license, if the licensee is selected for audit.

(g) Audiometric testing not conducted in a stationary acoustical enclosure.

(1) A notation shall be made on the hearing test if testing was not done in a stationary acoustical enclosure.

(2) Ambient noise level of the location of the audiometric testing, if not done in a stationary acoustical enclosure, shall include a notation on the hearing test of the following items:

(A) type(s) of equipment used to determine ambient noise level;

(B) model and serial number of equipment used to determine ambient noise level;

(C) date of last calibration of equipment used to determine ambient noise level; and

(D) the ambient noise level of the test environment.

(3) If audiometric testing is not conducted in a stationary acoustical enclosure, the test environment shall have a maximum allowable ambient noise level of 42 dBA.

(h) Audiometric testing conducted in a stationary acoustical enclosure.

(1) A notation shall be made on the hearing test if testing was done in a stationary acoustical enclosure.

(2) A stationary acoustical enclosure includes, but is not limited to, an audiometric test room.

(A) An audiometric test room is any enclosed space in which a listener is located for the purpose of testing hearing. An audiometric test room may also be known as:

(i) an audiometric test area;

(ii) a hearing test space; or

(iii) a hearing test room.

(B) An example of an audiometric test room would be a prefabricated room known as:

(i) an audiometric test booth;

(ii) a suite; or

(iii) a sound treated room.

(C) The primary and necessary requirement of an audiometric test room is to ensure that the maximum permissible ambient noise levels established by the American National Standards Institute do not exceed the levels for audiometric test room for ears covered 250 - 8000 Hz. The levels are as follows:
Figure: 22 TAC §141.16(h)(2)(C) (No change.)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 12, 2006.

TRD-200603728
Ronald Ensweiler
Chair
State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments
Effective date: August 1, 2006
Proposal publication date: January 13, 2006
For further information, please call: (512) 458-7111 x6972

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PART 17. TEXAS STATE BOARD OF PLUMBING EXAMINERS

CHAPTER 365. LICENSING AND REGISTRATION

22 TAC §365.14

The Texas State Board of Plumbing Examiners adopts amendments to rule §365.14, which provides for the criteria adopted by the Board for Continuing Professional Education Programs, without changes to the proposed text as published in the April 28, 2006, issue of the *Texas Register* (31 TexReg 3491).

Currently, §365.14(a)(7) of the rule requires providers of Course Materials to include perforated forms, used by those who do business with the Board, within the binding of the Course materials that may be removed. The amendments proposed to this rule section would change the requirement from the forms to be perforated for removal to the forms being included in a format to be seen as an example, not to be removed from the Course Materials.

No comments were received during the comment period following the publishing of the proposed rule amendment in the *Texas Register*. Comments were sought by the Board and received prior to the proposal of the rule amendment and were considered by the Board during its January 9, 2006 meeting. The majority of the comments received were regarding maintaining or increasing the current class size limitation of 45 students per class. The following is a summary of the comments submitted, discussion and consideration of the comments by the Board members at its January 9, 2006 meeting:

Curtis Winn, Individual CPE Provider/Instructor--Mr. Winn commented that the professionalism would suffer with larger classes that would not allow for as much input by attendees and increasing class size would make the quality of the class suffer.

Robert Stricker, CPE Instructor for APHCCT--Mr. Stricker commented that he has been an instructor for twelve years and has taught classes with 20 - 80 people in attendance. Mr. Stricker

commented that he felt that the number of licensees an instructor could handle would vary by instructor, as some are better instructors than others. Mr. Stricker commented that other industry CPE courses do not have limitations in size and he feels it should be up to the instructor as to how many they can handle. Mr. Stricker commented that it is a problem having to limit walk-ins after they have driven some distance to come to a class and can't get in.

Richard Pulaski, Individual CPE Provider/Instructor--Mr. Pulaski commented that he had thirty years in education and eighteen years of teacher training. Mr. Pulaski stated that he felt that 25 licensees in a class are ideal for proper interaction.

Nancy Jones, CPE Provider, APHCCT--Ms. Jones commented that she is a former teacher and understands the benefits of low student/teacher ratios, however she has sat in on many of APHCCT's instructors classes and sees no problem with increasing class size. Ms. Jones commented that many university classes have large class sizes.

Trent McNair, Individual CPE Provider/Instructor--Mr. McNair commented that although some instructors are better instructors than others and he understands the problem with limited walk-ins, he agrees with Mr. Winn that interaction is best with 15-20 licensees, as is the average with his classes. Mr. McNair commented that although larger classes can yield more profit, he believes that the licensees need to have interaction to get the most out of the courses. Mr. McNair stated that he believes the plumbing industry in Texas is far ahead of other states, and feels that increased class size would diminish quality.

Robert Doran, Individual CPE Provider/Instructor--Mr. Doran commented that he is opposed to increasing the class size. Mr. Doran stated that larger classes generally cause more disruption and there is better interaction with smaller classes.

Stanley Briers, CPE Course Material Provider, ICE--Mr. Briers commented that when CPE was first initiated there was much discussion regarding class size. Mr. Briers stated that he believed it was important that the licensees get something out of the class, not just sit there, and in order to do so there must be interaction. Mr. Briers commented that CPE cannot be compared with university classes because there is no homework, outside study, or testing required, as there is with university classes. Mr. Briers stated that allowing walk-ins will discourage registration in advance.

Jay Wark, Individual CPE Provider/Instructor--Mr. Wark commented that he does many private smaller classes as well as non-private classes and the comments from licensees in smaller classes are that the class is better.

TSBPE Board Chairman Hatchel opened the discussion up to members of the Board. The following are the summarized comments from Board members:

Mr. Cortes stated that he felt the class size should be left up to the discretion of the instructor.

Chairman Hatchel stated that there is no way to determine that the licensee received what they needed from the class as there is no examination.

Mr. Jalnos stated that he was in the first group of CPE instructors and has been in classes of all sizes. Mr. Jalnos stated that he felt there is a problem with walk-ins being turned away.

Ms. Betancourt stated that she is required in her profession to take CPE and would never expect to be allowed to just show up for a class that she hadn't registered for. Ms. Betancourt stated that the licensees are adults and all responsible adults must plan in advance for many things. Ms. Betancourt stated that the CPE program must reflect professionalism.

Mr. Lord stated that he, too, was once an instructor and believes that the licensees get more out of smaller classes. Mr. Lord stated that the Board has a responsibility to offer a quality program and that it is not about making money.

Ms. McLemore stated that if unlimited walk-ins were allowed, no one would pre-register. Ms. McLemore believes that there needs to be a maximum class size.

Mr. Chu stated that education is always better with a smaller ratio of students to teacher. Mr. Chu commented that although some universities have larger class sizes, there are other factors to consider. Mr. Chu stated that the current class limit is reasonable and that adults have a social responsibility to organize and plan for CPE.

Mr. Tarver stated that the only consideration should be what is best for the citizens. Mr. Tarver stated that smaller class sizes are better and the class size limit should remain as it is with 45 students allowed.

Ms. Betancourt made a motion to maintain the current class size limitation of 45 students. Mr. Tarver seconded the motion.

Mr. Cortes asked the Board's attorney, Jason Ray, Assistant Attorney General, if the class size limit is set for 45, would a provider be required to schedule 45 students for a class. Mr. Ray stated that the limit does not allow the provider to exceed the limit, but would allow them to schedule less than 45.

Chairman Hatchel called for a vote. All members voted in favor of the motion to keep the CPE class size limit at 45.

Chairman Hatchel asked the public if anyone had comment or opposition regarding the proposed change to eliminate the rule requirement for Board forms contained within the CPE material to be perforated. There was no comment or opposition.

Mr. Lord made a motion to eliminate the perforated forms from the CPE course materials. Mr. Jalnos seconded the motion and the motion carried.

Chairman Hatchel asked the public if anyone had comment regarding the elimination of the rule requirement for a Board approved CPE course subject list for elective subjects in the course materials.

Mr. Briers, CPE Course Material Provider, ICE--Mr. Briers commented that although he previously supported eliminating the subject list, he believes that the Board should have control over the subjects and the list should be maintained.

Nancy Jones, CPE Course Provider, APHCCT--Ms. Jones stated that although she had previously suggested eliminating the subject list, she too believed that the subject list should be maintained.

Robert Stricker, CPE Instructor, APHCCT--Mr. Stricker stated that he is in favor of maintaining the subject list.

Richard Pulaski, Individual CPE Provider/Instructor--Mr. Pulaski stated that he is in favor of maintaining the subject list.

Mr. Lord made a motion to continue to maintain the subject list for elective subjects in the course materials. Ms. Betancourt seconded the motion and the motion carried.

The Board periodically reviews and updates its forms to provide new or improved information. The new amendments to §365.14(a)(7) will help eliminate the use of outdated perforated forms found within the Course Materials.

The amendments to §365.14 are adopted under and affect Title 8, Chapter 1301, Occupations Code ("Plumbing License Law"), §1301.251, §1301.404 and the rule it amends. Section 1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law. Section 1301.404 provides the Board with authority to recognize, approve and administer continuing professional education programs for persons who hold licenses or endorsements under the Plumbing License Law.

No other statute, article or code is affected by this amendment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 11, 2006.

TRD-200603671
Robert L. Maxwell
Executive Director
Texas State Board of Plumbing Examiners
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Proposal publication date: April 28, 2006
For further information, please call: (512) 936-5224

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 37. FINANCIAL ASSURANCE

SUBCHAPTER W. FINANCIAL ASSURANCE FOR QUARRIES

30 TAC §§37.9160, 37.9165, 37.9170, 37.9175, 37.9180, 37.9185, 37.9190, 37.9195, 37.9200, 37.9205, 37.9210, 37.9215, 37.9220, 37.9225, 37.9230, 37.9235, 37.9240

The Texas Commission on Environmental Quality (TCEQ or commission) adopts new §§37.9160, 37.9165, 37.9170, 37.9175, 37.9180, 37.9185, 37.9190, 37.9195, 37.9200, 37.9205, 37.9210, 37.9215, 37.9220, 37.9225, 37.9230, 37.9235, and 37.9240. Section 37.9215 is adopted *with changes* to the proposed text as published in the March 24, 2006, issue of the *Texas Register* (31 TexReg 2395). Sections 37.9160, 37.9165, 37.9170, 37.9175, 37.9180, 37.9185, 37.9190, 37.9195, 37.9200, 37.9205, 37.9210, 37.9220, 37.9225, 37.9230, 37.9235, and 37.9240 are adopted *without changes* and the text will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Senate Bill (SB) 1354, 79th Legislature, 2005, amended Texas Water Code (TWC), Chapter 26, by adding new Subchapter M, Water Quality Protection Areas; specifically §§26.551 - 26.562. The statute addresses permitting, financial responsibility, inspections, water quality sampling, enforcement, cost recovery, and interagency cooperation with regard to quarry operations. The requirements of the statute are applicable to a pilot program in the John Graves Scenic Riverway, a stretch of the Brazos River watershed downstream of the Morris Shepard Dam on the Possum Kingdom Reservoir, and extending to the county line between Parker and Hood Counties.

Chapter 37, new Subchapter W, implements §26.553(f)(2) and §26.554. Subchapter W establishes financial assurance requirements for the John Graves Scenic Riverway pilot program. The purpose of the financial assurance requirements is to assure that adequate funds will be readily available to cover the costs of reclamation and restoration associated with quarries. Financial assurance is important for two reasons. First, it assures environmental needs related to quarries and the John Graves Scenic Riverway will be addressed using funds arranged by the responsible party. Second, it prevents delays in addressing environmental needs by assuring funds that are readily available.

A corresponding rulemaking is published in this issue of the *Texas Register* that includes the addition of new Subchapter H, Regulation of Quarries in the John Graves Scenic Riverway to 30 TAC Chapter 311, Watershed Protection.

SECTION BY SECTION DISCUSSION

New Subchapter W is adopted to be added to Chapter 37 to provide financial assurance requirements relating to reclamation and restoration related to quarries in the John Graves Scenic Riverway. The new subchapter also outlines the administrative procedures and requirements relating to these types of financial assurance. It is intended to be used in coordination with provisions of Chapter 311 and with certain provisions of Chapter 37, Subchapters A and B.

Adopted new §37.9160, Applicability, identifies who is subject to this subchapter and those entities that are exempt.

Adopted new §37.9165, Definitions, defines terms that are used throughout this subchapter.

Adopted new §37.9170, Financial Assurance Requirements for Reclamation and Restoration, indicates that owners and operators required to demonstrate financial assurance for reclamation or restoration must comply with certain general financial assurance requirements in Chapter 37, Subchapters A and B. Subsection (a)(1) - (4) outlines portions of Chapter 37, Subchapter B, that will not apply to owners and operators of quarries. Subsection (a)(4) specifies that §37.161 applies to quarry owners and operators, except that mechanism and wording requirements of a standby trust fund are found in this subchapter rather than Chapter 37, Subchapter B. Subsection (b) indicates that the amount of financial assurance must at least equal the current cost estimate. Required financial assurance amounts are further described in Chapter 311, Subchapter H. These amounts are reflective of the cost estimates referred to in this subchapter. Subsection (c) requires certain wordings for mechanisms and provides that the executive director will determine the acceptability of any mechanism submitted. The timing for providing the mechanism is described in subsection (d). For ease of administration and cost to the owner or operator, subsection (e) allows the use of a single financial assurance mechanism for both reclamation and restoration as long as the total mechanism amount is not less than the total required for each purpose. Continuous financial assurance until release by the executive director is provided for in subsection (f). Subsection (g) describes the conditions under which financial assurance mechanisms would be called upon. Finally, subsection (h) sets out the requirements

for the standby trust agreement that must be established in conjunction with surety bonds and irrevocable letters of credit.

Adopted new §37.9175, Financial Assurance Mechanisms for Reclamation, allows the use of a trust agreement, a surety bond guaranteeing payment, an irrevocable standby letter of credit, insurance, a financial test, or a corporate guarantee as mechanisms for meeting financial assurance requirements for reclamation.

Adopted new §37.9180, Financial Assurance Mechanisms for Restoration, allows the use of a trust agreement, a surety bond guaranteeing payment, an irrevocable standby letter of credit, insurance, a financial test, or a corporate guarantee as mechanisms for meeting financial assurance requirements for restoration.

Adopted new §37.9185, Trust Fund Requirements, describes the requirements for a trust fund used to demonstrate financial assurance for reclamation or restoration.

Adopted new §37.9190, Trust Agreement Wording, describes the wording required for a trust agreement evidencing establishment of a trust fund.

Adopted new §37.9195, Surety Bond Guaranteeing Payment Requirements, describes the requirements for a payment surety bond used to demonstrate financial assurance for reclamation or restoration.

Adopted new §37.9200, Payment Bond Wording, describes the wording required for a payment surety bond used to demonstrate financial assurance for reclamation or restoration.

Adopted new §37.9205, Irrevocable Standby Letter of Credit Requirements, describes the requirements for a letter of credit used to demonstrate financial assurance for reclamation or restoration.

Adopted new §37.9210, Irrevocable Standby Letter of Credit Wording, describes the wording required for a letter of credit used to demonstrate financial assurance for reclamation or restoration.

Adopted new §37.9215, Insurance Requirements, describes the requirements for insurance used to demonstrate financial assurance for reclamation or restoration. Subsection (b) is adopted with changes to the proposed text to require an insurer be either licensed in Texas or eligible as an excess and surplus lines carrier in Texas rather than in one or more states.

Adopted new §37.9220, Certificate of Insurance Wording, describes the wording required for a certificate of insurance used to demonstrate financial assurance for reclamation or restoration.

Adopted new §37.9225, Financial Test Requirements, describes the financial and reporting requirements for entities choosing to self-insure by using a financial test as a means of demonstrating financial assurance for reclamation or restoration.

Adopted new §37.9230, Financial Test Wording, describes the wording of the document that must be submitted by the chief financial officer of an entity choosing to use the financial test to demonstrate financial assurance for reclamation or restoration.

Adopted new §37.9235, Corporate Guarantee Requirements, describes the requirements for a higher tiered parent corporation choosing to use a corporate guarantee on behalf of a quarry owner or operator to demonstrate financial assurance for reclamation or restoration.

Adopted new §37.9240, Corporate Guarantee Wording, describes the wording required of a corporate guarantee used to demonstrate financial assurance for reclamation or restoration.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rules do not meet the definition of a "major environmental rule." Under Texas Government Code, §2001.0225, "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rules are intended to implement SB 1354, relating to the regulation of ongoing mining and quarrying within the newly created John Graves Scenic Riverway. The adopted rules in Chapter 37 clarify financial assurance requirements for quarries located in the John Graves Scenic Riverway. The adopted rules do not adversely affect, in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because the rules simply clarify financial assurance requirements for quarries located in the John Graves Scenic Riverway. The adopted rules do not meet the definition of a major environmental rule as defined in the Texas Government Code.

Furthermore, the adopted rulemaking action does not meet any of the four applicable requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a), only applies to a major environmental rule adopted by an agency, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the adopted rules do not meet any of these applicability requirements. First, the adopted rules are specifically required to implement SB 1354. Second, the adopted rules do not exceed a requirement of state law, because they are being adopted to implement SB 1354. Third, the rules do not exceed an express requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Fourth, the commission does not adopt these rules solely under the general powers of the agency, but rather under the authority of SB 1354, which directs the commission to implement rules under TWC, Chapter 26. These rules do not meet the criteria for a major environmental rule as defined by Texas Government Code, §2001.0225.

The commission solicited public comment on the draft regulatory impact analysis in the March 24, 2006, issue of the *Texas Register* (31 TexReg 2395). No comments were received on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether this action would constitute a takings under Texas Government Code, Chapter 2007. The adopted new

rules in Chapter 37 clarify financial assurance requirements for quarries located in the John Graves Scenic Riverway. The promulgation and enforcement of the rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The adopted rules also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Consequently, this rulemaking does not meet the definition of a takings under Texas Government Code, §2007.002(5). Therefore, the adopted rules will not constitute a takings under Texas Government Code, Chapter 2007.

The commission solicited public comment on the takings impact assessment in the March 24, 2006, issue of the *Texas Register* (31 TexReg 2397). No comments were received on the takings impact assessment.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

PUBLIC COMMENT

A public hearing on the proposed rules was held in Mineral Wells on April 6, 2006, at 6:30 p.m. at the Mineral Wells City Hall Annex, Council Chambers, 115 Southwest First Street. Written comments were received from the Brazos River Conservation Coalition (BRCC) and Jackson Sjoberg, McCarthy & Wilson, L.L.P. (McCarthy) on behalf of multiple parties including one individual, the Rocking "W" Ranch, and the BRCC. The comments generally concerned technical issues.

RESPONSE TO COMMENTS

BRCC commented that the insurance company providing coverage for financial assurance per §37.9215(b) should be licensed in Texas rather than in one or more states as the proposal indicated.

The commission agrees that requiring the insurer to be either licensed in Texas or eligible to provide insurance as an excess or surplus lines insurer in Texas would improve the rule by making the insurer subject to Texas regulations rather than the rules of another state, which may have unfamiliar requirements. To affect this change, the commission, at adoption, deleted the phrase "in one or more states" and replaced it with "in Texas" in subsection (b) of §37.9215.

BRCC also expressed concern about the financial test proposed in §37.9225 and the corporate guarantee proposed in §37.9235 since these "self-insuring" mechanisms represent the greatest risk that private funds would not be available to fund any necessary cleanup and/or restoration. Specifically, it urged the commission to require available assets of the owner/operator at least exceed the current cost estimates, review whether a $10 million tangible net worth was sufficient, and look at the historical success/failure of these mechanisms in other agency programs. McCarthy further stated that the commission should abandon financial test and corporate guarantee options in favor of letters of credit and insurance.

The commission disagrees that the financial test needs to be amended or abandoned. The structure of the financial test adopted under these rules is based upon the financial test developed and adopted by the United States Environmental Protection Agency in 1982 for the industrial hazardous waste program. Along with other financial ratios, the test requires the owner/operator to have audited financial statements reflecting a tangible net worth exceeding both $10 million and at least six times the amount of environmental liabilities assured through use of the financial test. The test is designed to be a predictor of the likelihood of bankruptcy and allow the owner/operator to obtain another financial assurance mechanism prior to bankruptcy. While it has been used most extensively in the industrial hazardous waste program, it is an available mechanism in an additional seven programs at TCEQ. To date, no failures of the test have been noted at TCEQ. Accordingly, the commission has made no changes to the proposed rules in response to these comments.

STATUTORY AUTHORITY

The new sections are adopted under TWC, §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013; §5.120, which states that the commission shall administer the law so as to promote the judicious use and maximum conservation and protection of the quality of the environment and the natural resources of the state; §26.011, which provides the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and §26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state. Rulemaking authority is expressly granted to the commission to adopt rules under TWC, Chapter 26, as amended by SB 1354, §2.

The adopted new rules implement SB 1354, which creates TWC, Chapter 26, new Subchapter M. SB 1354, §2, expressly requires the commission to adopt rules adequate to protect the water resources in a water quality protection area for inclusion in any authorization, including an individual or general permit.

§37.9215. Insurance Requirements.

(a) An owner or operator may satisfy the requirements of financial assurance by obtaining insurance that conforms to the requirements of this subchapter and submitting an originally signed certificate to the executive director.

(b) At a minimum, the insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in Texas.

(c) The wording of the certificate of insurance must be identical to the wording specified in §37.9220 of this title (relating to Certificate of Insurance Wording).

(d) The insurance policy must be issued for a face amount at least equal to the current cost estimate for reclamation or restoration, except when a combination of mechanisms are used in accordance with §37.41 and §37.9170 of this title (relating to Use of Multiple Financial Assurance Mechanisms and Financial Assurance Requirements for Reclamation and Restoration). Actual payments by the insurer shall not

change the face amount, although the insurer's future liability shall be lowered by the amount of the payments.

(e) The insurance policy must guarantee that funds shall be available to provide for reclamation at the quarry or restoration related to the quarry. The policy shall also guarantee that once reclamation at the quarry or restoration related to the quarry begins, the issuer shall be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon the direction of the executive director, to such party or parties as the executive director specifies.

(f) An owner or operator or any other person authorized to perform reclamation or restoration may request reimbursement for expenditures for reclamation at the quarry or restoration related to the quarry by submitting itemized bills to the executive director. The request shall include an explanation of the expenses and all applicable itemized bills. The owner or operator may request reimbursement for partial reclamation at the quarry or restoration related to the quarry only if the remaining value of the policy is sufficient to cover the maximum remaining costs of reclamation at the quarry or restoration related to the quarry. Within 60 days after receiving bills for reclamation at the quarry or restoration related to the quarry, the executive director shall determine whether the reclamation or restoration expenditures are in accordance with the approved reclamation or restoration activities or are otherwise justified, and if so, shall instruct the insurer to make reimbursement in such amounts as the executive director specifies in writing. If the executive director has reason to believe that the maximum cost of reclamation or restoration will be greater than the face amount of the policy, the executive director may withhold reimbursement of such amounts as deemed prudent until the executive director determines, in accordance with this subchapter, that the owner or operator is no longer required to maintain financial assurance requirements for reclamation at the quarry or restoration related to the quarry of the facility. If the executive director does not instruct the insurer to make such reimbursements, the executive director shall provide the owner or operator with a detailed written statement of reasons.

(g) The owner or operator shall maintain the policy in full force and effect until the executive director consents to termination of the policy. Failure to pay the premium, without substitution of alternate financial assurance as specified in this subchapter, shall constitute a violation of these regulations, warranting such remedy as the executive director deems necessary. Such violation shall be deemed to begin upon receipt by the executive director of a notice of future cancellation, termination, or failure to renew due to nonpayment of the premium, rather than upon the date of expiration of the policy.

(h) The policy must provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy shall, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate, or fail to renew the policy by sending notice by certified mail to the owner or operator and the executive director. Cancellation, termination, or failure to renew may not occur, however, during 120 days beginning with the date of receipt of the notice by both the executive director and the owner or operator, as evidenced by the return receipts.

(i) Cancellation, termination, or failure to renew may not occur and the policy shall remain in full force and effect in the event that on or before the date of expiration:

(1) the executive director deems the quarry abandoned;

(2) the permit expires, is terminated, is revoked, or a new or renewal permit is denied;

(3) reclamation or restoration is ordered by the executive director of the commission or by a United States district court or other court of competent jurisdiction;

(4) the owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code; or

(5) the premium due is paid.

(j) Each policy must contain a provision allowing assignment of the policy to a successor owner or operator. Such assignment may be conditional upon consent of the insurer, provided such consent is not unreasonably refused.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
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CHAPTER 101. GENERAL AIR QUALITY RULES

SUBCHAPTER H. EMISSIONS BANKING AND TRADING

DIVISION 7. CLEAN AIR INTERSTATE RULE

30 TAC §§101.501 - 101.504, 101.506, 101.508

The Texas Commission on Environmental Quality (commission) adopts new §§101.501 - 101.504, 101.506, and 101.508. Sections 101.501 - 101.503 are adopted *without changes* to the proposed text as published in the March 17, 2006, issue of the *Texas Register* (31 TexReg 1872) and will not be republished. Sections 101.504, 101.506, and 101.508 are adopted *with changes* to the proposed text and will be republished.

The new sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

On May 12, 2005, EPA promulgated the Clean Air Interstate Rule (CAIR) to assist nonattainment areas in downwind states in achieving compliance with the national ambient air quality standards (NAAQS) for particulate matter less than or equal to 2.5 microns ($PM_{2.5}$) and eight-hour ozone. Twenty-eight eastern states and the District of Columbia were identified as upwind contributors to the nonattainment of the $PM_{2.5}$ and eight-hour ozone NAAQS prompting the requirement for the reduction in emissions of sulfur dioxide (SO_2) and/or oxides of nitrogen (NO_x). Twenty-three states, including Texas, and the District of Columbia were found to contribute to the downwind nonattainment of the $PM_{2.5}$ NAAQS and are required to make reductions in annual emissions of SO_2 and NO_x. Twenty-five states and the District

of Columbia, not including Texas, were found to contribute to the downwind nonattainment of the eight-hour ozone NAAQS and are required to reduce ozone-season NO_x emissions. EPA modeled 37 states, including Texas, for $PM_{2.5}$ contribution using the Community Multiscale Air Quality Model. A criterion of 0.2 micrograms per cubic meter (æg/m^3) was used for determining whether SO_2 and NO_x emitted in one state made a significant contribution to $PM_{2.5}$ nonattainment in another state. State-by-state, zero-out modeling was then used to quantify the state's contribution for SO_2 and NO_x. EPA's modeling demonstrated that Texas provided a contribution of 0.29 æg/m^3 with two downwind "linkages," Madison County, Illinois and St. Clair County, Illinois. For ozone contribution, 31 states in the eastern United States were modeled. Since Texas was not included in the ozone modeling exercise, EPA did not determine that Texas contributed to ozone nonattainment in another state.

The NO_x and SO_2 reduction requirements under CAIR are being implemented in two phases by providing states with declining budgets. For NO_x, Phase I begins in 2009 and continues through the year 2014 with Texas receiving an initial NO_x budget of 181,014 tons annually. The Phase II NO_x budget will begin in 2015, with Texas receiving 150,845 tons annually. State SO_2 budgets are based on the allowance allocations provided under Federal Clean Air Act (FCAA), Title IV. Annual state budgets for Phase I, 2010 - 2014, are based on a 50% reduction of Title IV allowances allocated in the affected state. The initial SO_2 budget for Texas during Phase I is 320,946 tons. For Phase II, 2015 and thereafter, SO_2 budgets are based on a 65% reduction of Title IV allowances allocated in the affected state, with Texas receiving 224,662 tons.

EPA provided states with two compliance options for meeting the reduction requirements under CAIR: 1) meet the state's emission budget by requiring electric generating units (EGUs) to participate in an EPA-administered interstate cap and trade program; or 2) meet an individual state emissions budget through measures of the state's choosing. The 79th Legislature, 2005, enacted House Bill (HB) 2481, §2 (codified at Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.0173), requiring Texas to participate in the EPA-administered interstate cap and trade program through the incorporation by reference of the CAIR model trading rule. HB 2481 also provided specific direction for the methodology to be used in allocating the NO_x trading budget provided to Texas, identified an amount of CAIR NO_x allowances to be set aside for new sources, and specified that reductions associated with CAIR would only be required from new and existing EGUs and not from other sources of SO_2 and NO_x emissions.

HB 2481 amended THSC, Chapter 382 by adding §382.0173. THSC, §382.0173(a) requires that the commission adopt rules "incorporat{ing} by reference 40 CFR Subparts AA through II and Subparts AAA through III of Part 96 and 40 CFR Subpart HHHH of Part 60." Additionally, THSC, §382.0173(b) requires the commission to "make permanent allocations that are reflective of the allocation requirements of 40 CFR Subparts AA through HH and Subparts AAA through HHH of Part 96 and 40 CFR Subpart HHHH of Part 60 . . . at no cost . . . using the {EPA's} allocation method as specified by Section 60.4142(a)(1)(I), as issued by that agency on May 12, 2005, or 40 CFR Section 96.142(a)(1)(I), as issued by that agency on May 18, 2005, as applicable with the exception of nitrogen oxides which shall be allocated according to the additional requirements of Subsection (c)." THSC, §382.0173(c) provides additional requirements regarding NO_x allocations, specifically a requirement to maintain a special reserve of allocations for certain units, and requirements relating to establishing allocations for specific control periods. THSC, §382.0173(d) provided that its provisions applied only while the federal rules were enforceable and that the provisions of HB 2481 do "not limit the authority of the commission to implement more stringent emissions control requirements."

The commission interprets these requirements together in order to provide effect to the expressed intent of the legislature. Specifically, the commission interprets the language of new THSC, §382.0173(d) as not restricting existing authority to require further emissions control requirements, but not to interfere with, or change, the requirements of the CAIR NO_x and SO_2, or the Clean Air Mercury Rule (CAMR) mercury emission trading programs. The legislature expressed clear intent that the commission implement the CAIR and CAMR emission trading programs by requiring the incorporation by reference of the CAIR and CAMR program rules as promulgated by EPA, and requiring the use of EPA-specified allocation methodology, with some exceptions for CAIR NO_x allowances.

Under 40 Code of Federal Regulations (CFR) Part 96, EPA promulgated a model rule for the CAIR NO_x Annual Trading Program. This model rule is a market-based cap and trade system designed to reduce the costs of complying with the new NO_x and SO_2 reduction requirements. The CAIR model rule designates respective budgets for annual NO_x and SO_2 emissions within each state to be applied to all fossil fuel-fired boilers and turbines serving an electrical generator with a nameplate capacity greater than 25 megawatts of electricity (MWe) and producing electricity for sale. The model rule provides flexibility in complying with the NO_x and SO_2 reduction requirements through the unrestricted banking of excess allowances and the trading of allowances between EGUs in affected CAIR states under common caps. For example, EGUs in Texas will be allowed to trade NO_x allowances with other CAIR states participating in the CAIR NO_x Annual Trading Program, while the trading of SO_2 allowances will be permissible with CAIR states participating in the CAIR SO_2 Trading Program or the Title IV SO_2 Allowance Trading Program. The model rule provides states flexibility in the allocation methodology used to determine CAIR NO_x allowance allocations for each CAIR NO_x unit. CAIR states are then responsible for submitting the CAIR NO_x allowance allocations to EPA for recordation. CAIR SO_2 allowance allocations are distributed by EPA based on the CAIR source's Title IV SO_2 allowance allocation. Under the CAIR model rule, EPA takes responsibility for establishing CAIR compliance accounts for each CAIR source and maintaining an allowance tracking system to record the deposit, transfer, and deduction for compliance of all CAIR allowances. CAIR sources are required, under the model rule, to demonstrate compliance through the installation and operation of continuous emissions monitoring systems as required under 40 CFR Part 75. Finally, the model rule requires all elements of the CAIR NO_x Annual Trading Program and CAIR SO_2 Trading Program to be federally enforceable through the issuance of a CAIR permit as a complete and separable portion of the CAIR source's Title V permit.

As directed by HB 2481, the commission is adopting rules under Chapter 101, Subchapter H, Division 7 to incorporate 40 CFR Part 96, Subpart AA - Subpart II and Subpart AAA - Subpart III by reference for the purpose of complying with the CAIR. In addition, the commission is adopting specific rules under Subchapter H, Division 7 regarding the methodologies and procedures for determining each CAIR NO_x source's CAIR NO_x allowance allocation in lieu of the CAIR NO_x allowance allocation method-

ologies and procedures under 40 CFR Part 96, Subpart EE. The adopted rules apply to EGUs that are defined as a stationary, fossil fuel-fired boiler or a stationary, fossil fuel-fired combustion turbine serving at any time, since the startup of the unit's combustion chamber, a generator with nameplate capacity of more than 25 MWe and producing electricity for sale. The adopted rules also apply to cogeneration units serving at any time a generator with nameplate capacity of more than 25 MWe and supplying in any calendar year more than one-third of the unit's potential electric output capacity or 219,000 megawatts hours (MWh), whichever is greater, to any utility power distribution system for sale.

The adopted rules distribute the NO_x trading budget provided to Texas to each CAIR NO_x unit based on the specific direction provided under HB 2481. A total amount of CAIR NO_x allowances equal to 9.5% of the Texas NO_x trading budget will be set-aside as a special reserve for distribution to new units commencing operation on or after January 1, 2001. The remaining 90.5% of the Texas NO_x trading budget will be distributed to units having commenced operation before January 1, 2001, based on a three-year average of the unit's historical heat input adjusted for the type of fuel burned. In performing the fuel adjustment, a unit's historical heat input will be multiplied by the following: 90% for coal-fired, 50% for natural gas-fired, and 30% for all other fossil fuels. The adopted rules will also incorporate an allocation update beginning with the 2016 control period, and for the control period beginning every five years thereafter. The allocation update will adjust the baseline heat input used in determining the CAIR NO_x allowance allocation for each CAIR NO_x unit. In addition to the Texas NO_x trading budget, the CAIR model trading rule provides an additional pool of allowances available for allocation in the 2009 control period to those CAIR NO_x units achieving early NO_x reductions in 2007 and 2008, or whose compliance with the CAIR NO_x reduction requirements for the 2009 control period will create undue risk to the reliability of electricity supply during the year 2009. This pool of NO_x allowances, the compliance supplement pool, equates to an additional 772 tons for Texas. The adopted rules specify the requirements for a compliance supplement pool allowance request by CAIR NO_x sources.

The commission is concurrently adopting an additional rulemaking to 30 TAC Chapter 122, Federal Operating Permits Program, in this issue of the *Texas Register* to implement HB 2481. The commission is also adopting a CAIR SIP, rules to implement CAMR, and a CAMR state plan.

SECTION BY SECTION DISCUSSION

SUBCHAPTER H, EMISSIONS BANKING AND TRADING

Division 7, Clean Air Interstate Rule

Section 101.501, Applicability

Adopted new §101.501 states that the requirements of Subchapter H, Division 7 apply to any stationary, fossil fuel-fired boiler or stationary, fossil fuel-fired combustion turbine meeting the applicability requirements under 40 CFR Part 96, Subpart AA or Subpart AAA. 40 CFR Part 96, Subpart AA and Subpart AAA define applicable units as stationary, fossil fuel-fired boilers or combustion turbines serving at any time, since the startup of the unit's combustion chamber, a generator with a nameplate capacity of more than 25 MWe producing electricity for sale. The referenced applicability also includes cogeneration units serving at any time a generator with a nameplate capacity of more than 25 MWe and supplying in any calendar year more than one-third of the unit's potential electric output capacity or 219,000 MWh, whichever is greater, to any utility power distribution system for sale.

Section 101.502, Clean Air Interstate Rule Trading Program

Adopted new §101.502 incorporates by reference, with the exception of the requirements specified under Subchapter H, Division 7, the CAIR trading programs for annual NO_x and SO_2 codified under 40 CFR Part 96, Subpart AA - Subpart II and Subpart AAA - Subpart III finalized on May 12, 2005. The section requires owners and operators of sources subject to 40 CFR Part 96, Subpart AA - Subpart II or Subpart AAA - Subpart III to comply with the requirements of those subparts. The new section also specifies that the methodologies and procedures for determining CAIR NO_x allowance allocations in 40 CFR Part 96, Subpart EE are replaced by the requirements of this division.

The requirements of 40 CFR Part 96, Subpart AA - Subpart II relate to the CAIR NO_x Annual Trading Program. Specifically, 40 CFR Part 96, Subpart AA describes the general provisions of the CAIR NO_x Annual Trading Program, including definitions; applicability; an exemption from the permitting, monitoring, and reporting requirements of the program for retired units; and standard procedural requirements of the program. 40 CFR Part 96, Subpart BB outlines the procedures for the authorization of and the responsibilities of the CAIR designated representative and alternate CAIR designated representative for a CAIR NO_x source. The CAIR designated representatives or alternates represent and, through their representations, actions, inactions, or submissions, legally bind each owner and operator of a CAIR NO_x source in all matters pertaining to the CAIR NO_x Annual Trading Program. 40 CFR Part 96, Subpart CC describes the requirement for each CAIR NO_x source to apply for and obtain a CAIR permit containing all applicable CAIR NO_x Annual Trading Program requirements for each CAIR NO_x unit at the source. The CAIR permit is required to be a complete and separable portion of the CAIR NO_x source's Title V operating permit. 40 CFR Part 96, Subpart EE outlines the methods and procedures for determining CAIR NO_x allowance allocations, including the annual CAIR NO_x trading budgets for each state. The methods and procedures identified in 40 CFR Part 96, Subpart EE are replaced by the requirements of this division. 40 CFR Part 96, Subpart FF describes the CAIR NO_x allowance tracking system, the methods for establishing compliance and general accounts, the recording of CAIR NO_x allowance allocations into a CAIR NO_x source's compliance account, the procedures for deducting allowances for compliance, and the banking of CAIR NO_x allowances. Deductions for compliance are based on the monitoring and reporting requirements under 40 CFR Part 96, Subpart HH, with "penalty" deductions for exceeding the amount of allowances held in a compliance account being equal to three times the number of tons in excess. 40 CFR Part 96, Subpart GG describes the procedures for the submission and recordation of CAIR NO_x allowance trades. 40 CFR Part 96, Subpart HH provides the requirements for emissions monitoring, initial certification and recertification procedures for monitors, recordkeeping, and reporting.

40 CFR Part 96, Subpart II describes the opt-in provisions for the CAIR NO_x Annual Trading Program. The opt-in provisions apply to any unit that is not already a CAIR NO_x unit under 40 CFR §96.104 or covered by a retired unit exemption; has or is qualified to have a Title V operating permit; vents all emissions to a stack; and can meet the monitoring, recordkeeping, and reporting requirements of 40 CFR Part 96, Subpart HH. CAIR NO_x opt-in units are required to apply for and obtain a CAIR permit

as prescribed under 40 CFR Part 96, Subpart CC. Units electing to opt-in to the CAIR NO_x Annual Trading Program must monitor and report the NO_x emission rate and heat input of the unit in accordance with the monitoring and reporting requirements of 40 CFR Part 96, Subpart HH for the entire control period prior to the date that the unit elects to enter the CAIR NO_x Annual Trading Program. The baseline heat input and baseline emission rate for each CAIR NO_x opt-in unit is dependent upon the number of control periods for which the unit has monitored and reported heat input and emission rate data in accordance with 40 CFR Part 96, Subpart HH. If the unit has monitored and reported for only one control period, the baseline heat input and emission rate shall be the unit's total heat input and NO_x emission rate for the control period immediately preceding the date that the unit elects to opt-in. For units that have monitored and reported for more than one control period, the baseline heat input and emission rate shall be the average of the most recent three-year period. The opt-in provisions of 40 CFR Part 96, Subpart II allow opt-in units to choose from two different allocation methods for receiving an allocation of CAIR NO_x allowances. The general approach allocates CAIR NO_x allowances to opt-in units at 70% of their baseline NO_x emission rate with no additional reductions required after the 2009 control period. An alternative approach allocates CAIR NO_x allowances at the baseline levels for the 2009 - 2014 control periods, but requires deeper reductions starting in 2015. The CAIR NO_x allowance allocation for each control period beginning in 2015, and thereafter, is based on a NO_x emission rate equal to the lesser of 0.15 lb of NO_x/million British thermal units (MMBtu), the unit's baseline emission rate, or the most stringent state or federal NO_x emission limit applicable for any time during the applicable control period. Owners or operators of units may elect to opt-in to the CAIR NO_x Annual Trading Program without electing to opt-in to the CAIR SO_2 Trading Program and may withdraw from participation in the CAIR NO_x Annual Trading Program after five years of participation.

The requirements of 40 CFR Part 96, Subpart AAA - Subpart III relate to the CAIR SO_2 Trading Program and closely mirror the requirements for the CAIR NO_x Annual Trading Program under 40 CFR Part 96, Subpart AA - Subpart II. An element unique to the CAIR SO_2 Trading Program is the program's interaction and coordination with the Title IV SO_2 Trading Program. Under the CAIR SO_2 Trading Program, states have no discretion in the approach to the allocation of SO_2 allowances because EPA is basing the CAIR SO_2 allowance allocations on the SO_2 allocations already provided under the Title IV SO_2 Trading Program. Compliance with the CAIR SO_2 Trading Program is coordinated with the Title IV SO_2 Trading Program through requiring the use of Title IV SO_2 allowances for compliance with the CAIR SO_2 Trading Program at increasing ratios. Title IV SO_2 allowances allocated for 2010 - 2014 are retired for compliance with the CAIR SO_2 Trading Program at a ratio of two allowances per ton of emissions. SO_2 allowances allocated for 2015, and thereafter, are retired for compliance at a ratio of 2.86 allowances per ton of emissions. Title IV SO_2 allowances allocated for years prior to 2010 may be used for compliance with the CAIR SO_2 Trading Program at a ratio of one allowance per ton of emissions. SO_2 allowances are freely transferrable between sources covered by the Title IV SO_2 Trading Program and sources covered by the CAIR SO_2 Trading Program.

40 CFR Part 96, Subpart AAA describes the general provisions of the CAIR SO_2 Trading Program including definitions; applicability; an exemption for retired units; and standard procedural requirements of the program. 40 CFR Part 96, Subpart BBB outlines the procedures for the authorization of and the responsibilities of the CAIR designated representative and alternate CAIR designated representative for a CAIR SO_2 source. 40 CFR Part 96, Subpart CCC describes the requirement for each CAIR SO_2 source to apply for and obtain a CAIR permit containing all applicable CAIR SO_2 Trading Program requirements for each CAIR SO_2 unit at the source. 40 CFR Part 96, Subparts DDD and EEE are reserved. 40 CFR Part 96, Subpart FFF describes the CAIR SO_2 allowance tracking system, establishment of compliance accounts and general accounts, recordation of CAIR SO_2 allowance allocations, procedures for deducting allowances for compliance, and the banking of CAIR SO_2 allowances. Deductions for compliance are based on the monitoring and reporting requirements under 40 CFR Part 96, Subpart HHH, with "penalty" deductions for exceeding the amount of allowances held in a compliance account being equal to three times the number of tons in excess.

The deduction of SO_2 allowances outlined under 40 CFR Part 96, Subpart FFF for compliance with the CAIR SO_2 Trading Program is determined in two steps. First, CAIR SO_2 allowances are deducted at a 1:1 ratio for compliance with the Title IV SO_2 Trading Program. Secondly, any additional deductions for compliance with the CAIR SO_2 Trading Program are made at the applicable ratio for the vintage year allowance being deducted. For example, a CAIR SO_2 unit emits 100 tons of SO_2 in the 2012 control period. The compliance account for the CAIR SO_2 unit holds 70 vintage 2009 allowances and 60 vintage 2012 allowances. For compliance with the Title IV SO_2 Trading Program, 70 vintage 2009 allowances and 30 vintage 2012 allowances are deducted to cover the 100 tons of emissions, leaving an excess of 30 vintage 2012 allowances. However, for CAIR, the tonnage equivalent for the deduction to comply with the Title IV SO_2 Trading Program is 85 allowances (70 vintage 2009 allowances and 30 vintage 2012 allowances used at a 2:1 ratio). The remaining 30 vintage 2012 allowances not needed for compliance with the Title IV SO_2 Trading Program are deducted from the compliance account at a 2:1 ratio to make up the 15-ton difference for compliance with the CAIR.

40 CFR Part 96, Subpart GGG describes the procedures for submitting and recording CAIR SO_2 allowance trades. 40 CFR Part 96, Subpart HHH provides the requirements for emissions monitoring, certification and recertification of monitors, recordkeeping, and reporting. 40 CFR Part 96, Subpart III describes the opt-in provisions for the CAIR SO_2 Trading Program. The opt-in provisions apply to an owner or operator of a unit that is not already a CAIR SO_2 unit under 40 CFR §96.204 or that is/that is not covered by a retired unit exemption; has or is qualified to have a Title V operating permit; vents all emissions to a stack; and can meet the monitoring, recordkeeping, and reporting requirements of 40 CFR Part 96, Subpart HHH. Owners or operators of CAIR SO_2 opt-in units are required to apply for and obtain a CAIR permit as prescribed under 40 CFR Part 96, Subpart CCC. Owners or operators of units electing to opt-in to the CAIR SO_2 Trading Program are required to monitor and report the SO_2 emission rate and heat input of the unit in accordance with the monitoring and reporting requirements of 40 CFR Part 96, Subpart HHH for the entire control period prior to the date that the unit elects to enter the CAIR SO_2 Trading Program. The baseline heat input and baseline emission rate for each CAIR SO_2 opt-in unit is dependent upon the number of control periods for which the unit has monitored and reported heat input and emission rate data in accordance with 40 CFR Part 96, Subpart HHH. If the owners or operators of a unit have monitored and

reported for only one control period, the baseline heat input and emission rate shall be the unit's total heat input and SO_2 emission rate for the control period immediately preceding the date that the unit elects to opt-in. For owners or operators of units that have monitored and reported for more than one control period, the baseline heat input and emission rate shall be the average of the most recent three-year period. The opt-in provisions of 40 CFR Part 96, Subpart III allow owners or operators of opt-in units to choose from two different allocation methods for receiving an allocation of CAIR SO_2 allowances. The general approach allocates CAIR SO_2 allowances to opt-in units at 70% of their baseline SO_2 emission rate with no additional reductions required after the 2010 control period. An alternative approach allocates CAIR SO_2 allowances at the baseline levels for the 2010 - 2014 control periods, but requires deeper reductions starting in 2015. The CAIR SO_2 allowance allocation for each control period beginning in 2015, and thereafter, is based on an SO_2 emission rate equal to the lesser of the unit's baseline emission rate multiplied by 10% or the most stringent state or federal SO_2 emission limit applicable for any time during the applicable control period. Owners or operators of units may elect to opt-in to the CAIR SO_2 Trading Program without electing to opt-in to the CAIR NO_x Annual Trading Program and may withdraw from participation in the CAIR SO_2 Trading Program after five years of participation.

Section 101.503, Clean Air Interstate Rule Oxides of Nitrogen Annual Trading Budget

Adopted new §101.503 specifies that the NO_x trading budget for annual allocations of CAIR NO_x allowances for each control period in 2009 - 2014 and for 2015, and thereafter, are equivalent to the tons of NO_x emissions listed for Texas in the state trading budget under 40 CFR §96.140. As finalized on May 12, 2005, 40 CFR §96.140 provides Texas with an annual NO_x trading budget of 181,014 tons for each control period in 2009 - 2014, and 150,845 tons for each control period in 2015, and thereafter. The adopted rule also reserves an amount of CAIR NO_x allowances equivalent to 9.5% of the Texas NO_x trading budget for allocation to new units. This new unit set-aside equates to 17,196 tons of CAIR NO_x allowances for each control period in 2009 - 2014, and 14,330 tons of CAIR NO_x allowances for each control period in 2015, and thereafter.

Section 101.504, Timing Requirements for Clean Air Interstate Rule Oxides of Nitrogen Allowance Allocations

New §101.504 outlines the deadlines by which the executive director shall submit to EPA the CAIR NO_x allowance allocations for each CAIR NO_x unit subject to this division. The adopted rule requires the executive director to submit to EPA by October 31, 2006, the CAIR NO_x allowance allocations for the 2009 - 2014 control periods, as determined under §101.506(c) for CAIR NO_x units with a historical baseline heat input. Based on comment, the required deadlines for submittal to EPA of the CAIR NO_x allowance allocations under §101.504(a)(2) - (4) were revised from June 1 to October 31 on the basis that historically the Acid Rain data to be used in determining the proper allocations for future control periods is not available until well after the June 1 time period. The commission notes that preliminary Acid Rain data from the previous control period is typically available by June of the following year, however, this data may be revised by a source prior to the data being finalized. In order to avoid any potential complications with revised data impacting the allocation of CAIR NO_x allowances, the commission is electing to delay submittal of CAIR NO_x allowance allocations until such allocations can be based on final Acid Rain data. In addition, an October 31 deadline date is consistent with the submittal deadline date for the 2009 - 2014 control periods under §101.504(a)(1) and with the submittal deadline date for CAIR NO_x allocations from the new unit set-aside under §101.504(b). As a result, the adopted rule requires submittal to EPA of the CAIR NO_x allowance allocations determined under §101.506(c) for the 2015 control period by October 31, 2011, and for the 2016 control period by October 31, 2014. Beginning with the 2017 control period, and for each control period thereafter, the CAIR NO_x allowance allocations determined under §101.506(c) shall be submitted to EPA 14 months prior to each applicable control period. For example, the CAIR NO_x allowance allocations determined under §101.506(c) for the 2017 control period shall be submitted to EPA by October 31, 2015, 14 months prior to January 1, 2017. The adopted deadline for submittal of the CAIR NO_x allowance allocations for the 2016 control period, and for each control period thereafter, allows for a minimum lead time of no more than 14 months between recordation of the allocation by EPA and the start of the applicable control period. This lead time is in conflict with the required minimum lead time of three years provided under 40 CFR §51.123(o)(2)(ii) for states declining the adoption of the allocation provisions under 40 CFR Part 96, Subpart EE. However, the submittal deadline is consistent with HB 2481, requiring the update of the baseline heat input used in determining the CAIR NO_x allowance allocations for CAIR NO_x units in Texas. HB 2481 states that beginning with the 2016 control period, and for each control period beginning every five years thereafter, the baseline heat input for all affected CAIR NO_x units must be updated to reflect the average of the three highest amounts of the unit's adjusted control period heat input during control periods one through five of the previous seven control periods. For example, the baseline period for determining CAIR NO_x allowance allocations for the 2016 control period would be the average of the unit's three highest amounts of adjusted heat input from the 2009 - 2013 control periods. To meet the required three-year minimum lead time under 40 CFR §51.123(o)(2)(ii), the allocations for the 2016 control period must be submitted no later than January 1, 2013. Therefore, the federal requirement does not allow for the completion of the baseline period mandated under HB 2481. The deadline for submission of CAIR NO_x allowance allocations 14 months in advance of each control period beginning in 2016, and thereafter, allows for the completion of the mandated baseline period, as well as provides time for the executive director to determine the updated CAIR NO_x allowance allocations and submit the updated allocations to EPA.

New §101.504 also specifies the deadline for submission of CAIR NO_x allowance allocations by the executive director to EPA for allowances distributed from the new unit set-aside. For the 2009 control period, and for each control period thereafter, the CAIR NO_x allowance allocations determined under §101.506(d) and (e) shall be submitted to EPA by October 31 of that control period. The new rule also describes the manner in which EPA will allocate CAIR NO_x allowances should the executive director fail to submit the allocations by the deadlines in §101.504(a). Should the CAIR NO_x allowance allocations not be provided to EPA by the applicable deadlines in §101.504(a) for each control period, in accordance with 40 CFR §96.141, EPA will assume that the CAIR NO_x allowance allocations for the applicable control period are the same as for the immediately preceding control period. If the applicable control period is 2015, EPA will assume the CAIR NO_x allowance allocations equal 83% of the allocations for the 2014 control period. For units receiving allocations under §101.506(d) and (e), if the executive director fails to submit the CAIR NO_x allowance allocations by the applicable

deadline in §101.504(b), EPA will assume that no CAIR NO_x allowances are to be allocated, for the applicable control period, to any CAIR NO_x unit that is otherwise receiving an allocation from the new unit set-aside.

Section 101.506, Clean Air Interstate Rule Oxides of Nitrogen Allowance Allocations

Adopted new §101.506 describes the methodology to be used in distributing CAIR NO_x allowances, in tons, for each CAIR NO_x unit subject to this division. For units commencing operation before January 1, 2001, CAIR NO_x allowances are allocated based on a three-year average historical heat input, in MMBtu, adjusted for the type of fuel burned. For each control period in 2009 - 2015, the baseline heat input for units commencing operation before January 1, 2001, will be the average of the three highest amounts of the unit's historical heat input, adjusted for fuel type, from calendar years 2000 - 2004. Beginning with the 2016 control period, and for the control period beginning every five years thereafter, the baseline heat input for units commencing operation prior to January 1, 2001, will be adjusted to reflect the average of the three highest amounts of the unit's control period heat input, adjusted for fuel type, from control periods one through five of the previous seven control periods. The fuel type adjustments are performed by multiplying a unit's baseline heat input by the following: 90% for coal-fired, 50% for natural gas-fired, and 30% for all other fossil fuels.

For units commencing operation on or after January 1, 2001, CAIR NO_x allowances are allocated for each control period in 2009 - 2014 from the new unit set-aside identified under §101.503(b). Beginning with the 2015 control period, units commencing operation on or after January 1, 2001, and operating each calendar year for a period of five or more consecutive years will be eligible to receive their CAIR NO_x allowance allocation from the general NO_x trading budget on a modified output basis. The baseline heat input will be the average of the three highest amounts of the unit's total converted control period heat input from the first five years of operation. In response to comment, the rule was revised to delete the phrase "and for each control period thereafter" from subsection (b)(2) to eliminate the possibility of two conflicting baseline periods applying to units commencing operation on or after January 1, 2001, and operating for five or more consecutive years, for the 2016 control period, and for every fifth control period thereafter. Beginning with the 2016 control period, and for the control period beginning every five-year period after 2016, the baseline heat input will be adjusted to reflect the average of the three highest amounts of the unit's total converted control period heat input from control periods one through five of the previous seven control periods. To calculate a unit's converted control period heat input on a modified output basis, the unit's gross electrical output is multiplied by a heat rate conversion factor of 7,900 British thermal units per kilowatt-hour (Btu/kWh) for coal-fired units and 6,675 Btu/kWh for natural gas- and oil-fired units. For cogeneration units, the converted heat input is calculated by converting the available thermal output, in Btu, of useable steam to an equivalent heat input by dividing the thermal output by a general boiler/heat exchanger efficiency of 80%. For combustion turbine cogeneration units, the converted heat input is calculated by first converting the available thermal output of useable steam from the heat recovery steam generator or heat exchanger to an equivalent heat input by dividing the thermal output by a general boiler/heat exchanger efficiency of 80%. Then the electrical generation from the combustion turbine must be added after conversion to an equivalent heat input by multiplying the electrical output by 3,413 Btu/kWh. The sum yields the total equivalent heat input for the combustion turbine cogeneration unit.

The adopted allocation methodology distributes 90.5% of the Texas NO_x trading budget to each CAIR NO_x unit with a baseline heat input determined under §101.506(a) or (b)(2) or (3) in proportion to each CAIR NO_x unit's share of baseline heat input to the total baseline heat input for all CAIR NO_x units with a baseline heat input determined under §101.506(a) or (b)(2) or (3). For units that commence operation on or after January 1, 2001, and that have not established a historical baseline heat input in accordance with §101.506(b)(2) or (3), CAIR NO_x allowances are allocated from the new unit set-aside beginning with the later of the 2009 control period or the first control period after the control period in which the new unit commences commercial operation. The adopted allocation methodology requires the executive director to distribute CAIR NO_x allowances from the new unit set-aside upon receipt of a request from the CAIR designated representative for the CAIR NO_x unit. Submittal of each request for a CAIR NO_x allowance allocation from the new unit set-aside is required on or before July 1 of the first control period for which the request is being made and after the date that the CAIR NO_x unit commences commercial operation. CAIR NO_x allowances requested from the new unit set-aside will not be allocated in excess of the new unit's total tons of NO_x emissions reported to EPA for the previous control period. On or after July 1 of each control period, the executive director shall review each CAIR NO_x allowance allocation request, determine the sum of all CAIR NO_x allowance allocation requests, and allocate CAIR NO_x allowances from the new unit set-aside for the control period. If the amount of CAIR NO_x allowances in the new unit set-aside is greater than or equal to the sum of all CAIR NO_x allowances requested, then the executive director shall allocate the amount of CAIR NO_x allowances requested. If the amount of CAIR NO_x allowances in the new unit set-aside is less than the sum of all CAIR NO_x allowances requested, then the executive director shall allocate to each new CAIR NO_x unit an amount of CAIR NO_x allowances in proportion to the amount of CAIR NO_x allowances requested by a CAIR NO_x unit to the total amount of CAIR NO_x allowances requested by all CAIR NO_x units. In the adopted allocation methodology, new units begin receiving allowances from the set-aside for the control period immediately following the control period in which the new unit commences commercial operation based on the unit's emissions reported for the previous control period. Therefore, a CAIR NO_x source operating a new unit is required to hold allowances covering the emissions from the new unit for the control period in which the new unit commences commercial operation, but will not receive an allocation for that control period. CAIR NO_x allowance allocations for a new unit in subsequent control periods will continue to be based on the unit's emissions from the previous control period until the unit establishes a baseline in accordance with §101.506(b)(2) or (3).

In response to comments, the commission has added new subsection (g) specifying a deadline for units completing their first five years of commercial operation to certify with the executive director the data needed to establish a baseline heat input under §101.506(b)(2) or (3). The new subsection requires the gross electrical output of the generator or generators served by the unit and total heat energy of any steam produced by the unit to be submitted in writing to the executive director by the latter of July 1, 2011, or July 1 of the control period immediately following the unit's fifth consecutive year of commercial opera-

tion. This deadline provides an adequate amount of time for the CAIR designated representative to submit the relevant data and for the executive director to determine the CAIR NO_x allocations from the general NO_x trading budget and the new unit set-aside prior to the applicable EPA allocation submittal deadlines.

Due to the timing requirements under §101.504 for submittal of CAIR NO_x allowance allocations to EPA, a new unit completing its first five years of commercial operation and establishing its baseline under §101.506(b)(2) or (3) by the end of the 2010 control period will begin receiving a CAIR NO_x allowance allocation from the general NO_x trading budget beginning with the 2015 control period. Based on the requirements of HB 2481, beginning with the 2016 control period, and for the control period beginning every five years thereafter, a new unit must complete its first five consecutive years of operation prior to the end of the revised five-year baseline period in order to receive an allocation from the general NO_x trading budget. For example, to receive an allocation from the general NO_x trading budget for the 2016 control period, a new unit must complete its first five consecutive years of operation by the end of the 2014 control period. The new unit will then begin receiving CAIR NO_x allowances from the general NO_x trading budget beginning with the 2016 control period based on the average of the three highest amounts of the unit's converted control period heat input during the 2009 - 2014 control periods. All CAIR NO_x allowance allocations under the adopted allocation methodology are rounded to the nearest whole allowance.

New §101.506 allows for the distribution of any unallocated CAIR NO_x allowances remaining in the new unit set-aside for a given control period to CAIR NO_x units with a historical baseline heat input receiving an allocation under §101.506(c). These existing units will each receive an additional allocation proportional to the ratio of their original allocation to the state's existing unit allocation, 90.5% of the Texas NO_x trading budget. This distribution is performed by multiplying the amount of unallocated CAIR NO_x allowances remaining in the set-aside by each CAIR NO_x unit's allocation determined under §101.506(c), divided by 90.5% of the Texas NO_x trading budget, and rounded to the nearest whole allowance.

The adopted new §101.506 also requires, for the purposes of determining CAIR NO_x allowance allocations, a CAIR NO_x unit's control period heat input, status as coal-fired or natural gas-fired, and total tons of NO_x emissions during a calendar year to be determined in accordance with 40 CFR Part 75, to the extent the unit was otherwise subject to those requirements for the year. If a CAIR NO_x unit was not otherwise subject to the requirements of 40 CFR Part 75 for the year, the unit's control period heat input, status as coal-fired or natural gas-fired, and total tons of NO_x emissions during a calendar year will be based on the best available data reported to the executive director.

Section 101.508, Compliance Supplement Pool

New §101.508 outlines the requirements for the allocation of additional CAIR NO_x allowances for the 2009 control period from the compliance supplement pool for Texas provided under 40 CFR §96.143. As promulgated on May 12, 2005, 40 CFR §96.143 provides Texas with an additional 772 CAIR NO_x allowances under the compliance supplement pool. The adopted rule allows the compliance supplement pool allowances to be distributed to those CAIR NO_x units that achieve early NO_x reductions in 2007 and 2008, beyond any applicable state or federal emission limitation during those years. CAIR NO_x units seeking an additional allocation from the compliance supplement pool for early NO_x reductions in 2007 and 2008 are required to monitor and report the unit's NO_x emission rate and heat input in accordance with the continuous emissions monitoring and reporting requirements under 40 CFR Part 96, Subpart HH for the entire control period in which the early reductions are being generated. The CAIR designated representative is required to submit to the executive director by July 1, 2009, a request for an allocation of CAIR NO_x allowances from the compliance supplement pool in an amount not to exceed the sum of the CAIR NO_x unit's emission reductions, in tons, during 2007 and 2008, that were not necessary to comply with any state or federal emission limitation applicable during those years.

In addition, new §101.508 provides for the allocation of additional CAIR NO_x allowances from the compliance supplement pool for CAIR NO_x units whose compliance with the CAIR NO_x annual trading program in the 2009 control period will create undue risk to the reliability of electricity supply during 2009. The CAIR designated representative is required to submit to the executive director by July 1, 2009, a request for an allocation of CAIR NO_x allowances from the compliance supplement pool in an amount not to exceed the minimum amount of CAIR NO_x allowances necessary to remove the risk to the reliability of electricity supply. In such requests, the CAIR designated representative is required to demonstrate that in the absence of the additional allocation to the unit, the unit's compliance with the CAIR NO_x annual trading program during the 2009 control period will create an undue risk to electric reliability during 2009. This demonstration is required to show that it would not be feasible to obtain a sufficient amount of electricity from other electric generation facilities or obtain a sufficient amount of CAIR NO_x allowances from the compliance supplement pool by making early NO_x reductions in 2007 and 2008.

The executive director shall review each request for an additional allocation from the compliance supplement pool and, if approved, allocate CAIR NO_x allowances for the 2009 control period to CAIR NO_x units covered by a request. If the amount of CAIR NO_x allowances in the compliance supplement pool is greater than or equal to the sum of all CAIR NO_x allowances requested, then the executive director shall allocate the amount of CAIR NO_x allowances requested. If the amount of CAIR NO_x allowances in the compliance supplement pool is less than the sum of all CAIR NO_x allowances requested, then the executive director shall allocate to each CAIR NO_x unit covered under a request an amount of CAIR NO_x allowances in proportion to the amount of CAIR NO_x allowances requested by a CAIR NO_x unit to the total amount of CAIR NO_x allowances requested by all CAIR NO_x units. The adopted rule requires the executive director to determine and submit to EPA by November 30, 2009, the CAIR NO_x allowance allocations from the compliance supplement pool.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rulemaking meets the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rulemaking does not, however, meet any of the four applicability criteria for requiring a regulatory im-

pact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The adopted new rules are an incorporation by reference of the federal CAIR. The CAIR includes EPA-administered emissions trading programs that will be governed by model rules provided in the CAIR, which states may incorporate by reference. The EPA found that Texas is among several states that contribute significantly to nonattainment of the NAAQS for $PM_{2.5}$ in downwind states. The EPA is requiring these upwind states to revise their SIPs to include control measures to reduce emissions of SO_2 and/or NO_x, which are precursors to $PM_{2.5}$ formation. Reducing upwind precursor emissions will assist downwind $PM_{2.5}$ nonattainment areas to achieve the NAAQS in a more equitable, cost-effective manner than if those areas implemented local emissions reductions alone. The EPA has specified the amount of each state's required reductions, but each state has flexibility to choose the measures by which it achieves them. If states choose to control EGUs, then they must establish a budget or cap for those sources. The CAIR defines the EGU budgets for the affected states if the states choose to control only EGUs or if they choose to control other sources to achieve some or all of their reductions. States may adopt the CAIR NO_x model allowance allocation methodology or choose an alternative method to allocate the state budget of NO_x emissions allowances to sources in the state.

Specifically, the adopted rulemaking would incorporate by reference the CAIR model emissions trading rules located in 40 CFR Part 96, Subpart AA - Subpart II, and Subpart AAA - Subpart III. In addition, the rulemaking adopts an alternative NO_x allowance allocation methodology for Texas CAIR NO_x sources in lieu of the model rule methodology in 40 CFR Part 96, Subpart EE. The adopted rulemaking fulfills the requirements of HB 2481, enacted by the 79th Legislature, to incorporate CAIR by reference; to adopt an alternate NO_x allowance allocation methodology; to specify the sources to which the trading program is applicable; to set the timing requirements to report annual unit allocations to EPA; to detail the operation of the compliance supplement pool; to specify that a percentage of the state's annual allocation will be set-aside for new units; and to provide that allowances will be available at no cost.

The incorporation of CAIR requires emission reductions from certain new and existing stationary, fossil fuel-fired electric utility units, including boilers and combustion turbines, and certain cogeneration units that meet specific applicability criteria. The adopted incorporation of the federal rule is intended to protect the environment and to reduce risks to human health and safety from environmental exposure by reducing NO_x and SO_2 emissions from upwind states so that downwind states may reach attainment of the NAAQS for $PM_{2.5}$. The CAIR includes revisions to the Acid Rain Program regulations under FCAA, Title IV, particularly the regulatory provisions governing the SO_2 cap and trade program. The revisions streamline the operation of the Acid Rain SO_2 cap and trade program and facilitate its interaction with the CAIR trading program. While the required emissions reductions of these programs are based on controls that are known to be highly cost-effective for EGUs, the requirements may have adverse impacts on certain utilities, which could be considered a sector of the economy. The exact cost to each unit cannot be predicted, but significant costs to comply with the emission reductions programs may be expected for at least some units that install or upgrade emission controls or that purchase allowances. While the adopted rulemaking is intended to protect human health and the environment, it may adversely affect in a material way sources in the state that fall under the applicability requirements in the federal rule. Cost and benefits of the CAIR were analyzed by EPA during the federal notice and comment rulemaking for the CAIR. CAIR is a required federal program, and the ability of states to modify its requirements is limited.

The adopted rulemaking implements the requirements of the FCAA. Under 42 United States Code (USC), §7410(a)(2)(D), each SIP must contain adequate provisions prohibiting any source within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment of the NAAQS in any other state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter" (42 USC, Chapter 85, Air Pollution Prevention and Control). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule. Additionally, states have further obligations under 42 USC, §7410(a)(2)(D), to address interstate transport of pollutants that contribute significantly to nonattainment in, or interfere with maintenance by, another state. In the CAIR, EPA found that 28 states and the District of Columbia contribute significantly to nonattainment of the $PM_{2.5}$ or eight-hour ozone NAAQS in downwind areas. The EPA is requiring these upwind states to revise their SIPs to include control measures to reduce emissions of SO_2 and/or NO_x, with limited flexibility. Adoption of the federal CAIR and participation in its emissions cap and trade approach for annual SO_2 and NO_x emissions to reduce downwind $PM_{2.5}$ is the method the state has chosen to achieve those reductions in a flexible and cost-effective manner.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission pro-

vided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." (*Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978)).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of the adopted rulemaking is to protect the environment and to reduce risks to human health by adoption of the federal CAIR by reference, and to specify some components of the trading program for which the federal rule allows for flexibility of choice by the state. The adopted rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this adopted rulemaking. Finally, this adopted rulemaking was not developed solely under the general powers of the agency, but is required by THSC, TCAA, §382.0173. Therefore, this adopted rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because although the adopted rulemaking meets the definition of a "major environmental rule," it does not meet any of the four applicability criteria for a major environmental rule.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the adopted rulemaking is to incorporate by reference the federal CAIR emissions trading rules located in 40 CFR Part 96, Subpart AA - Subpart II and Subpart AAA - Subpart III, and to specify some components of the trading program for which the federal rule allows for flexibility of choice by the state. The 79th Legislature enacted HB 2481, which created a requirement in THSC, TCAA, §382.0173 to adopt the federal CAIR program rules by reference. Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law and by state law.

In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these adopted rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). EPA promulgated the CAIR rule to reduce NO_x and SO_2 emissions from upwind states so that downwind states may reach attainment of the NAAQS for $PM_{2.5}$. The adopted rules will enable Texas to implement the federal emissions budget and trading program and impose its requirements on new and existing fossil fuel-fired electric utility units, ultimately ensuring reductions of NO_x and SO_2 emissions. The action will specifically advance the health and safety purpose by reducing $PM_{2.5}$ levels through an emissions cap and gradual reductions in emissions of NO_x and SO_2. The rules specifically target a category of sources with significant NO_x and SO_2 emissions, and through the cap and trade program support cost-effective control strategies. Consequently, the adopted rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4) and (13). For these reasons, Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code,

§§33.201 *et seq*.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), concerning Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). No new sources of air contaminants are authorized and the adopted new rules will maintain at least the same level of or increase the level of emissions control as the existing rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.32). This rulemaking action complies with 40 CFR Part 51, concerning Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The requirements of 42 USC, §7410 are applicable requirements of 30 TAC Chapter 122. Facilities that are subject to the Federal Operating Permit Program will be required to obtain, revise, reopen, and renew their federal operating permits as appropriate in order to include CAIR.

PUBLIC COMMENT

The commission conducted public hearings on the proposed rules on April 11, 2006, in Austin; April 12, 2006, in Fort Worth; and April 13, 2006, in Houston. During the public comment period, which closed at 5:00 p.m., April 17, 2006, the commission received comments from American Electric Power (AEP); American Wind Energy Association (AWEA); Association of Electric Companies of Texas, Inc. (AECT); Austin Physicians for Social Responsibility (APSR); Blue Skies Alliance; Calpine; Clean Water Action (CWA); Entergy Services Inc. (Entergy); EPA; Environment Texas; FPL Group (FPL); Gulf Coast Lignite Coalition (GCLC); League of Women Voters of Texas (LWV); Lone Star Chapter of Sierra Club (Lone Star Sierra Club); NRG Texas (NRG); Public Citizen; Representative Dennis Bonnen (District 25); Senator Ken Armbrister (District 18); Sierra Club of Dallas-Fort Worth (DFW Sierra Club); Sierra Club - Houston Regional Group (Houston Sierra Club); Southwestern Public Services (SPS); Suez Energy Generation NA, Inc. (SEGNA); Texas Association of Business (TAB); Texas Impact; Texas Mining and Reclamation Association (TMRA); The Sustainable Energy and Economic Development Coalition (SEED); TXU Power (TXU); and 139 individuals.

NRG supported comments submitted by GCLC; TMRA supported comments submitted by AECT and GCLC; GCLC supported comments submitted by TMRA and AECT; and Entergy supported comments submitted by AECT.

TXU, Entergy, AECT, and SPS concurred with Representative Bonnen's comments.

RESPONSE TO COMMENTS

FEDERAL APPROVABILITY

EPA commented that the proposed SIP and rule language for the submittal of CAIR NO_x allocations by the state to EPA under §101.504 do not meet the federal deadline requirements under 40 CFR §51.123(o)(2)(ii). EPA commented that with the current proposed rule language, EPA could only conditionally approve the Texas CAIR rule and SIP, and the SIP and rule language would need to align with the federal deadline requirement to receive final federal approval.

The commission appreciates the comment, and is aware that the CAIR NO_x allocation time line adopted in this rule does not meet the federal time line requirements in the revised final CAIR rule that was published in the *Federal Register* on April 28, 2006. The commission has been directed by the legislature under HB 2481 to adopt the proposed time line. Commission staff are in the process of notifying legislators that the directive in HB 2481 will not accommodate the requirements of the revised final federal CAIR program.

EPA commented that participation in the federal CAIR trading programs for NO_x and SO_2 requires the adoption of rules substantively identical to the 2006 revised CAIR model trading rules. If the commission cannot adopt the CAIR model rule revisions promulgated in 2006, EPA will consider a conditional approval of these rules. The necessary revisions include: incorporating by reference the revisions to 40 CFR Part 96 Subparts AA - II and Subparts AAA - III; updating references to the applicability of CAIR and the definition of an electric generating unit or cogeneration unit; incorporating the revisions to the CAIR designated representative; revising the proposed allocation methodology under §101.504(c) to address amendments to 40 CFR §96.141; and revising the figures in §101.506(b)(2)(C) and (b)(3)(C) to use "3,413 Btu/kWh" to be consistent with revisions to 40 CFR §96.142. EPA also commented that the commission would need to incorporate the changes to the Acid Rain program at 40 CFR Parts 72 - 74 and 78 as published in the *Federal Register* on April 28, 2006 to interact seamlessly with CAIR.

The commission appreciates the comment, and is aware that subsequent rule changes regarding the revised final CAIR that were published in the Federal Register on April 28, 2006, will need to be incorporated into the Texas rules and CAIR SIP in order to receive final federal approval. The commission anticipates initiating rulemaking and a SIP revision proposing to incorporate these needed changes in the near future.

RENEWABLE ENERGY SET-ASIDE

AWEA, Public Citizen, SEED, Blue Skies Alliance, and Lone Star Sierra Club commented that the adopted rules should include a set-aside for renewable energy. AWEA recommended a method to incorporate renewable energy into the proposed CAIR NO_x allocation methodology under §101.506, and provided information from the State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials regarding model alternative allocation methodology for renewable energy. The suggested method would provide a direct allocation of NO_x allowances for renewable energy technologies as new sources using the modified output-based approach. Renewable energy sources in operation for less than five years would receive an allocation from the new unit set-aside by multiplying their generation output by a standard allocation rate of 1.5 pounds of NO_x per megawatt hour. Renewable energy sources in operation for five or more years would receive an allocation from the general pool by converting their generation output to heat

input using the proposed heat rate for non-coal units of 6,675 Btu/kWh. In addition, the AWEA commented that the proposed new unit set-aside of 9.5% should be altered to adequately accommodate future growth estimates, including growth for renewable resources. In addition, one individual commented that the commission should promote renewable energy and energy conservation.

The rules have not been revised in response to these comments. HB 2481, 79th Legislature, 2005, directed the commission to incorporate by reference the federal CAIR model trading rule and make permanent allocations that are reflective of the NO_x allocation requirements of 40 CFR Part 96, Subpart AA - Subpart HH. Under 40 CFR §96.104, the CAIR trading program only applies to fossil fuel-fired electric generating units with a nameplate capacity greater than 25 MWe and producing electricity for sale. The methodology outlined under 40 CFR Part 96, Subpart EE and the specific direction given under HB 2481 limit the methodology for determining NO_x allocations to fossil fuel-fired electric generating units only. Since renewable energy is not classified as fossil fuel-fired electric generation, the commission does not have the authority to adopt CAIR rules that include a set-aside for renewable energy. Additionally, HB 2481 directed the commission to maintain a NO_x set-aside for new units, as defined by 40 CFR Part 96, Subparts AA - HH, equal to 9.5% of the Texas CAIR NO_x budget. The commission may not alter the amount of the set-asides provided by statute in the manner suggested by the commenter.

The commission does, however, support the promotion of renewable energy and energy conservation through pollution prevention programs.

MORE STRINGENT CONTROLS

Public Citizen, SEED, Blue Skies Alliance, Lone Star Sierra Club, Environment Texas, and 42 individuals commented that HB 2481 provides the commission the authority in implementing the federal CAIR program to require more stringent NO_x and SO_2 controls than those in the federal rules. Entergy, AECT, GCLC, NRG, TXU, TMRA, and SPS commented that HB 2481 does not provide the commission with the authority in implementing the federal CAIR program to impose more stringent NO_x and SO_2 control requirements than those required under the federal rule. Public Citizen, SEED, Blue Skies Alliance, DFW Sierra, Lone Star Sierra Club, and 49 individuals commented that the proposed rules should be modified to require more stringent NO_x reductions than the federal rules. Entergy, AECT, GCLC, NRG, TXU, TMRA, FPL, and SPS opposed any revisions to the rule imposing more stringent NO_x and SO_2 reduction requirements than those required under the federal rule. Public Citizen, SEED, Blue Skies Alliance, and Lone Star Sierra Club requested that the proposed rules be adopted with lower emissions caps and emission rates for NO_x and SO_2, and that NO_x emissions from East Texas be capped at no more than 100,000 tons per year and at a rate not to exceed 0.05 pounds of NO_x/MMBtu for coal-fired EGUs.

The commission has made no changes in response to these comments. The legislature, during the 79th Legislature, 2005, enacted HB 2481, which requires Texas to participate in the EPA-administered interstate cap and trade program for NO_x emissions and annual SO_2 emissions by incorporating the federal CAIR by reference. HB 2481 also provided that its provisions applied only while the federal rules were enforceable and that its provisions did not limit the authority of the commission to implement more stringent emissions control requirements. As indicated in the proposal preamble, the commission interprets these requirements together in order to provide effect to the expressed intent of the legislature. Specifically, the commission continues to interpret the language of new THSC, §382.0173(d) as not restricting existing authority to require further emission control requirements, but not to interfere with, or change, the requirements of the CAIR NO_x or SO_2 emission trading programs. The legislature expressed clear intent that the commission implement the CAIR emission trading program by requiring the incorporation by reference of the CAIR program rules as promulgated by EPA, and requiring the use of EPA-specified allocation methodology, with some exceptions for CAIR NO_x allowances. Requiring more stringent NO_x reductions than required by the federal CAIR would not correspond with the statutory requirement to incorporate the CAIR by reference, which specifies the emission budgets for NO_x and SO_2. Similarly, adopting lower emission caps and emission rates for NO_x and SO_2 generally, and providing for a specific cap and emission rate for East Texas NO_x emissions would be out of line with the flexibility provided for in the federal CAIR, and thus prescribed by the legislature. The federal CAIR provides flexibility in complying with NO_x and SO_2 reduction requirements through the unrestricted banking of excess allowances and the trading of allowances between EGUs in affected CAIR states under common caps. By requiring the commission to incorporate the federal rules by reference, the commission must also incorporate the emission budgets contained in the federal CAIR model trading rules.

Representative Dennis Bonnen and Senator Armbrister commented that the legislature did not intend HB 2481, §2 to be interpreted to allow more stringent emission control requirements in the TCEQ rules adopting the federal CAIR.

The commission appreciates the information provided by Representative Bonnen and Senator Armbrister.

LWV commented that a 90% reduction in NO_x and SO_2 is an achievable goal, that public health is of primary importance, and that a 90% reduction in NO_x and SO_2 would be more protective than the proposed reductions.

The rules have not been revised in response to this comment. While the commission agrees that 90% reductions in NO_x and SO_2 emissions would provide more reductions than proposed, the commission has not assessed whether a 90% reduction in NO_x and SO_2 emissions is achievable as part of this rulemaking. HB 2481, 79th Legislature, 2005, specifically directed the commission to adopt and incorporate by reference 40 CFR Part 96, Subparts AA - II and Subparts AAA - III and specified the methodology for the allocation of CAIR NO_x allowances. Therefore, the commission does not have the authority to require additional emission reductions from EGUs within the scope of implementing CAIR.

Seventy-six individuals requested that the time line for NO_x and SO_2 reductions be accelerated to require reductions from EGUs to be met by 2010. GCLC and TMRA commented that the commission should reject any request to accelerate the time line for complying with the proposed NO_x and SO_2 reductions due to the technical and logistical constraints with retrofitting the appropriate control equipment on existing lignite-fired units. GCLC and TMRA further commented that NO_x and SO_2 emission reductions that cannot be met with technically feasible and commercially demonstrated technology threaten the continued viability of lignite as a part of the electric generation fuel mix. GCLC and TMRA also commented that suggestions that a 70% NO_x and SO_2 reduction can be achieved by 2008 are incorrect. GCLC

and TMRA state that in developing the federal rules, EPA determined the CAIR time lines while considering such factors as availability of controls and the logistics associated with retrofitting existing equipment, and specifically projected that it would take at least 3 years to install certain types of pollution control technology.

The rules have not been revised in response to these comments. Under HB 2481, 79th Legislature, 2005, the commission was directed to incorporate by reference 40 CFR Part 96, Subparts AA - II and Subparts AAA - III. The commission must adhere to the time lines established by the EPA in the federal CAIR model trading rule for NO_x under Subparts AA - II, and for SO_2 under Subparts AAA - III. Under the federal rules, the CAIR NO_x program begins in 2009 and the SO_2 portion begins in 2010. The commission does not have the authority to accelerate these time lines for EGUs.

GCLC commented that compliance with CAIR in Texas will result in a significant additional contribution to air quality from the Texas EGU community, which has already made extraordinary efforts in achieving the lowest state NO_x emission rate of any coal burning state. In developing the federal CAIR rules, EPA determined the final CAIR emissions caps while considering several factors, including: performance, applicability, availability, cost effectiveness, and logistics of various available control technologies. GCLC commented that EPA's consideration of these factors in the federal CAIR indicate that suggestions regarding the feasibility of 70% NO_x and SO_2 emission reductions by 2008 are not grounded in fact, and are incorrect. Lastly, GCLC notes that EPA estimated that for CAIR Phase I, 39.6 gigawatts (GW) of capacity would need to be retrofitted with flue gas desulfurization and that 23.9 GW would need to be retrofitted with select catalytic reduction; and that for Phase II, 32.4 GW would need to be retrofitted with flue gas desulfurization and 26.6 GW would need to be retrofitted with select catalytic reduction.

The commission has made no change in response to this comment. The commission acknowledges that compliance with CAIR may result in additional emission reductions from Texas EGUs. Based on EPA's predictions, by 2010 Texas EGUs will reduce SO_2 emissions by 31% or 180,000 tons and by 2015 a total of 39% by or 226,000 tons. Texas EGUs are also predicted to reduce NO_x by 21% or 44,000 tons by 2009 and by 2015 a total of 25% or 52,000 tons of NO_x will be reduced. It is also important to note that since Texas will be participating in the EPA-administered cap and trade program for CAIR, reductions could be higher if EGUs elect to over-control beyond their CAIR budgets or could be less if EGUs choose to purchase CAIR allowances for compliance.

Houston Sierra Club commented that CAIR should be implemented in Texas as specified by the legislature via an incorporation by reference of the federal CAIR model trading rule. However, through the commission's authority to protect public health, welfare, safety, and the environment, the commission should require through future rulemaking further reductions so that the total NO_x and SO_2 budget for Texas equates to an 80% to 90% reduction in NO_x and SO_2 emissions.

The commission has made no changes in response to this comment. Decisions regarding future rulemaking activities must be properly made in those future actions, after public notice and comment.

DALLAS -FORT WORTH AIR QUALITY

Public Citizen, SEED, Blue Skies Alliance, and Lone Star Sierra Club commented that they disagree with the commission's finding in the proposal rule preamble that there will be no cost to local governments in implementing these rules and that if big emission reductions aren't made here, then far more expensive emissions reductions will have to be made in order to bring the Dallas-Fort Worth area and other nonattainment areas in Texas into attainment with the eight-hour ozone NAAQS, which will shift enormous costs to local governments and their citizens.

The commission has made no change in response to the comment. As discussed elsewhere in this preamble, the legislature has directed the commission to implement the mandatory federal CAIR program. The commission is not required to assess possible indirect consequences, including fiscal implications, for units of local government in its fiscal analysis. The commission did note that "local governments owning EGUs with a nameplate capacity of more than 25 MWe used to produce electricity for sale may experience adverse fiscal implications as a result of the proposed new rules." In addition, the commission notes that the fiscal analysis considers the costs to local governments from administration and enforcement of the proposed rules. Potential future costs to local governments relating to the administration and enforcement of other NO_x emission reduction strategies are beyond the scope of this rulemaking.

APSR, CWA, Texas Impact, and 46 individuals requested that the proposed rules be adopted requiring 70% NO_x and SO_2 reductions in order to assist the Dallas-Fort Worth area in meeting health-based standards for air quality. Public Citizen, SEED, Blue Skies Alliance, DFW Sierra Club, Lone Star Sierra Club, and 45 individuals commented that NO_x and SO_2 emissions from coal-fired EGUs in East Texas are impacting attainment of the national ambient air quality standard for ozone in the Dallas-Fort Worth area. Public Citizen further commented that adopting lower CAIR limits (cap on East Texas emissions at no more than 100,000 tons per year and at a rate for coal plants not to exceed .05 pounds per MMBtu) is critical to making progress toward attainment of the eight-hour ozone NAAQS in the Dallas-Fort Worth area, and to providing health benefits in other areas of Texas. Public Citizen provided an analysis of the effect of CAIR reductions on the Dallas-Fort Worth area. Public Citizen also commented that new power plants currently being proposed and the governor's executive order expediting permitting for those plants further complicates the ability to bring the Dallas-Fort Worth area into attainment for the eight-hour ozone NAAQS. Public Citizen commented that if the proposed rules are not modified to assure that air quality is protected, additional and far more costly retrofit will be required of newly permitted plants. Public Citizen commented that the cost per ton of controlling NO_x from power plants is approximately $900 to $1,500 per ton, which is possibly one of the least expensive forms of NO_x control. Public Citizen commented that Dallas-Fort Worth and other areas are facing loss of federal highway funds and other economic sanctions if they fail to meet clean air standards. Public Citizen provided a presentation to the commission entitled "CAIR Limits Matter." The presentation discussed concerns about DFW air quality and attainment of the national ambient air quality standards. The presentation also focused on putting more stringent controls for NO_x in place through CAIR.

The rules have not been revised in response to these comments. The federal CAIR requires upwind states to revise their SIPs to include control measures to reduce emissions of SO_2 and NO_x. Reducing upwind precursor emissions will assist downwind $PM_{2.5}$ and eight-hour ozone nonattainment areas in achieving the $PM_{2.5}$

and eight-hour ozone NAAQS. The federal CAIR is specifically intended to address the transport of emissions over the eastern portion of the United States, and its focus is directed at the reduction of upwind precursors, not at the attainment of a local area within Texas, specifically the Dallas-Fort Worth area. The commission is currently developing eight-hour ozone attainment demonstrations for the Dallas-Fort Worth and Houston-Galveston-Brazoria nonattainment areas, that will likely include a number of proposed control measures and will provide opportunity for public comment.

One individual commented with concerns about the episodes chosen for ozone modeling in the DFW area and the wind directions on the specific days that were modeled.

The commission made no changes in response to this comment. The adoption of rules to implement the federal CAIR trading program is independent of SIP development for individual nonattainment areas that must develop SIPs to attain the NAAQS. Ozone attainment modeling concerns are beyond the scope of this rulemaking.

MISCELLANEOUS

EPA suggests clarification of the date for a CAIR NO_x source to report a unit's gross electrical output under proposed §101.506(b).

The rules have been revised based on this comment to specify a deadline of July 1, 2011, or July 1 of the control period immediately following the end of the unit's fifth consecutive year of commercial operation, whichever is later. This deadline will provide an adequate amount of time for the CAIR designated representative to submit the relevant data and for the executive director to determine the CAIR NO_x allocations from the general NO_x trading budget and the new unit set-aside prior to the applicable EPA allocation submittal deadlines.

EPA also provided comments regarding typographical errors. First, on page 1-1, section 1.2 of the CAIR SIP narrative, EPA noted that the proposed language incorrectly identified the citation for the state budgets established under the federal CAIR. Texas must meet the state budget for annual NO_x emissions established in 40 CFR §51.123(e)(2) and the state budget for annual SO_2 emissions established in 40 CFR §51.124(e)(2). Second, on page 1 - 2 of the CAIR SIP narrative, the proposed language referenced only 40 CFR Part 96, Subpart AA instead of Subparts AA - II for NO_x and Subpart AAA instead of Subparts AAA - III for annual SO_2 emissions. Third, on page 5-5 of the CAIR SIP narrative, the proposed language refers to 40 CFR Part 97, instead of Part 96 for the CAIR designated representative. Lastly, EPA and AECT commented that the proposed rule language under §101.508(a) references 40 CFR §96.140 instead of 40 CFR §96.143.

The commission appreciates the comments and has made changes to reflect the federal CAIR requirements accurately. In addition, the rules have been revised to reference the correct citation to 40 CFR §96.143 under §101.508(a).

AECT commented that the proposed June 1 deadline under §101.504(a)(2) - (4) for the executive director to submit CAIR NO_x allocations to EPA should be revised on the basis that historically the Acid Rain data that would be used to determine the proper NO_x allocations is not available until well after June 1. AECT recommends revising the submittal deadline to October 31 of each control period as opposed to June 1.

The commission revised the rules based on this comment to require submittal to EPA of CAIR NO_x allocations determined under §101.506(c) by October 31. The intent of the proposed rule was to determine CAIR NO_x allocations for future control periods based on final data reported to EPA for compliance with the Acid Rain Program. The commission understands that preliminary Acid Rain data is typically available by June 1, however, this data may be revised prior to being finalized. The revision to the rule also provides for consistency between the submittal deadlines under §101.504(a)(1) and (a)(2) - (4).

AECT commented that the proposed rule language under §101.506(b)(2) specifies one method to calculate the baseline heat input for every control period starting with the 2015 control period, while proposed §101.506(b)(3) specifies a different method to calculate baseline heat input for the 2016 control period and for every fifth control period thereafter. AECT notes that either of the two calculation methods could be used to calculate baseline heat input for the 2016 control period and for every fifth control period thereafter and could presumably result in two different baseline heat inputs being calculated for any of those control periods. AECT recommends one of two revisions to correct this situation. Either revise proposed §101.506(b)(1) to apply to the 2009 - 2015 control periods and delete proposed §101.506(b)(2) or revise proposed §101.506(b)(2) to only apply to the 2015 control period. Lastly, AECT comments that HB 2481 does not prohibit these changes, since THSC, §382.0173(c)(1) does not state that the allocation of new units' NO_x allowances for the 2015 control period cannot also be made from the special reserve for new units.

The commission has revised the rules based on this comment to delete the phrase "and for every control period thereafter" from proposed §101.506(b)(2). The revised rule specifies a baseline heat input for the 2015 control period for units commencing operation on or after January 1, 2001, and operating for a period of five or more consecutive years, calculated as the average of the three highest amounts of total converted control period heat input over the first five years of operation.

GCLC commented that the proposed NO_x allocation methodology accurately implements HB 2481 by setting aside allowances for new sources and requiring reductions from new and existing EGUs but not from other sources. NRG commented that the proposed rules reasonably reflect the emission allocations and time lines specified in the federal CAIR model rule, as directed by HB 2481. Calpine commented that the proposed rules incorporate modifications to the federal CAIR contemplated in HB 2481. TMRA commented that it supports the commission's efforts to adopt state rules that conform to the federal CAIR and that reflect the intent and specific requirements of HB 2481. AECT commented that the proposed rules are consistent overall with the federal CAIR and HB 2481, §2. SPS commented that the proposed rules are consistent with the federal CAIR and HB 2481.

The commission appreciates the support.

SPS requested that the commission include in the adopted rules an express contingency provision to automatically exclude West Texas from CAIR in the event that West Texas is excluded from participation in the federal CAIR program.

The commission has made no change in response to this comment. HB 2481, 79th Legislature, 2005, directed the commission to incorporate by reference the federal CAIR model trading rule and to make permanent allocations that are reflective of the allocation requirements of 40 CFR Part 96, Subpart AA - Subpart

HH as issued by EPA on May 12, 2005. These requirements include EGUs from West Texas. HB 2481 directed the commission to "take all reasonable and appropriate steps to exclude West Texas from the federal CAIR rule," . . . "including filing a petition for reconsideration with" EPA (Texas Health and Safety Code, §382.0173(f)). The commission submitted such a Petition for Reconsideration to EPA on July 11, 2005, but EPA denied the petition (*See* 71 FR 25304 (April 28, 2006)). Meanwhile, the inclusion of West Texas in CAIR has been challenged in federal court by the City of Amarillo and a number of West Texas sources. This challenge has been consolidated with other claims related to CAIR (*See North Carolina et al. v. EPA*, Case No. 05-01244 (District of Columbia Circuit)). The commission is not participating in this litigation. While the proposed provision may be consistent with the legislature's intent, and may promptly remove West Texas from the CAIR in the event the pending litigation succeeds or EPA otherwise decides to remove West Texas from the CAIR, there was no opportunity for public notice and comment on this provision. The commission is anticipating further rulemaking, as discussed elsewhere in this preamble, to incorporate changes to the federal CAIR that were recently finalized; and may include such a provision in this future proposal.

Houston Sierra Club commented that the commission should calculate the specific NO_x and SO_2 reductions for Texas based on the allocated Phase I and Phase II budgets so that the public can easily understand their significance for the proposed rule. Houston Sierra Club calculated that the NO_x budget would require a 16.67% reduction, and the SO_2 budget would require a 30% reduction by Phase II.

The commission appreciates the comment, and acknowledges that the federal CAIR is a complex rule, but has made no changes in response to this comment. Based on the state NO_x and SO_2 budgets provided to Texas under the federal CAIR rule, EPA has predicted the NO_x and SO_2 reductions associated with CAIR compliance. According to EPA's predictions, CAIR compliance will result in a NO_x reduction of 21% in Texas or 44,000 tons by 2009 and a total of 25% or 52,000 tons by 2015. It is also predicted that by 2010 Texas EGUs will reduce SO_2 emissions by 31% or 180,000 tons and by 2015 a total of 39% or 226,000 tons. However, it is important to note that because Texas will be participating in the EPA - administered cap and trade program for CAIR, reductions could be higher if EGUs elect to over-control (reduce emissions greater than necessary for compliance in order to bank allowances for trading purposes) or the reductions could be less if EGUs choose to purchase CAIR allowances to stay in compliance instead of installing controls. Market-based emission cap and trade systems, like the federal CAIR, provide flexibility to comply with emission reduction requirements through unrestricted banking of excess allowances (held by companies that over-control) and trading of allowances (sold by companies that over-control to companies that need to purchase allowances to stay in compliance).

Houston Sierra Club commented that the discussion of the CAIR proposal is difficult to understand and the commission should simplify its explanation of the rule so that the public can understand what is being proposed and the implications of the proposal.

The commission appreciates the comment, and acknowledges that the federal CAIR is a complex rule, but has made no changes in response to this comment. Due to the complexity of the federal CAIR rule, and the requirement under HB 2481 to incorporate the federal CAIR by reference, the adopted rule is also complex. Although the language may be cumbersome, it maintains the continuity of the federal CAIR rule within the state's rules. Information regarding the federal CAIR is available at EPA's Web site, *http://www.epa.gov/interstateairquality/*. The commission also has information regarding the federal CAIR and its implementation in Texas available at the TCEQ Web site, *http://www.tceq.state.tx.us/implementation/air/sip/cair-camr.html*.

Houston Sierra Club commented that it is of great concern that the TCEQ is not taking a stronger stand against the harmful effects of particulates, mercury, sulfates and nitrogen oxides; and that it is unacceptable and shameful that two of Texas' most beautiful and magnificent natural landscapes, Big Bend National Park and Guadalupe Mountains National Park too often look like a bad pollution day in Houston.

The commission has made no change in response to this comment. Concerns regarding particulates and mercury are beyond the scope of this rulemaking; and controls on sulfates and nitrogen oxides more stringent than those provided for by the federal CAIR are prohibited by HB 2481, as discussed elsewhere in this response to comments.

LWV and GHASP commented that effects screening levels (ESLs) should be set at enforceable levels based on what is in the airshed now and what might be added in the future in order to protect public health.

The commission made no changes in response to this comment. The adopted rules are designed to implement the federal CAIR program and not to develop ESLs. Nitrogen dioxide and sulfur oxides are currently regulated by federal national ambient air quality standards. Therefore, ESLs are not developed for these compounds.

Seventy-four individuals commented that the announcement of the public hearings for the proposed rulemaking should have been broadcast on local news stations to increase public awareness.

The commission has made no changes in response to this comment. The commission has complied with the requirements for public hearings and notification under 40 CFR §51.102 and §60.23, Texas Government Code, Subchapter B, Chapter 2001, and under THSC, TCAA, §382.017. The commission strives to give all citizens of Texas appropriate prior notification and opportunity to comment, including the ability to submit written comments. Hearing notices for these rules were published in the following newspapers: *Austin American-Statesman*, March 9, 2006; *Corpus Christi Caller-Times*, March 8, 2006; *El Paso Times*, March 8, 2006; *Fort Worth Star-Telegram*, March 8, 2006; *Houston Chronicle*, March 8, 2006; and the *Midland Reporter-Telegram*, March 8, 2006. In addition, on March 9, 2006, a media release was posted to the TCEQ Web site and faxed to radio and television stations and daily and weekly newspapers in the Austin, Dallas-Fort Worth, and Houston markets. The release was also delivered on March 9, 2006, via the media relations listserve, to which anyone may subscribe (see "email alerts" under News Releases on the TCEQ Web site). The commission has no control over the conditions under which media choose to publish or broadcast the content of these releases.

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which

authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The new sections are also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.014, concerning emission inventory; §382.016, concerning Monitoring Requirements; HB 2481, §2 of the 79th Legislature, codified at §382.0173, concerning adoption of rules regarding certain SIP requirements and standards of performance for certain sources; and §382.054, concerning federal operating permits; and FCAA, 42 USC, §§7401 *et seq.*, which requires states to include in their SIPs adequate provisions prohibiting any source within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment, or interfere with maintenance of, the NAAQS in any other state.

The adopted new sections implement THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, HB 2481, §2 of the 79th Legislature, codified at §382.0173, and §382.054; and FCAA, 42 USC, §§7401 *et seq*.

§101.504. Timing Requirements for Clean Air Interstate Rule Oxides of Nitrogen Allowance Allocations.

(a) The executive director shall submit to the United States Environmental Protection Agency (EPA) the Clean Air Interstate Rule (CAIR) oxides of nitrogen (NO_x) allowance allocations determined in accordance with §101.506(c) of this title (relating to Clean Air Interstate Rule Oxides of Nitrogen Allowance Allocations) by the following dates:

(1) October 31, 2006, for the 2009 - 2014 control periods;

(2) October 31, 2011, for the 2015 control period;

(3) October 31, 2014, for the 2016 control period; and

(4) 14 months prior to the beginning of each applicable control period for the control period beginning in 2017 and for each control period thereafter.

(b) For the control period beginning in 2009, and for each control period thereafter, the executive director shall submit to EPA the CAIR NO_x allowance allocations determined in accordance with §101.506(d) and (e) of this title by October 31 of the applicable control period.

(c) If the executive director fails to submit to EPA the CAIR NO_x allowance allocations in accordance with subsection (a) of this section, EPA will assume that the allocations of CAIR NO_x allowances for the applicable control period are the same as for the control period that immediately precedes the applicable control period, except that, if the applicable control period is in 2015, EPA will assume that the allocations equal 83% of the allocations for the control period that immediately precedes the applicable control period.

(d) If the executive director fails to submit to EPA the CAIR NO_x allowance allocations in accordance with subsection (b) of this section, EPA will assume that no CAIR NO_x allowances are to be allocated, for the applicable control period, to any CAIR NO_x unit that would otherwise be allocated CAIR NO_x allowances under §101.506(d) and (e) of this title.

§101.506. Clean Air Interstate Rule Oxides of Nitrogen Allowance Allocations.

(a) For units commencing operation before January 1, 2001:

(1) for each control period in 2009 - 2015, the baseline heat input, in million British thermal units (MMBtu), is the average of the three highest amounts of the unit's adjusted control period heat input for 2000 - 2004 with the adjusted control period heat input for each year calculated as follows:

(A) if the unit is coal-fired during the year, the unit's control period heat input for such year is multiplied by 90%;

(B) if the unit is natural gas-fired during the year, the unit's control period heat input for such year is multiplied by 50%; and

(C) if the unit is not subject to subparagraph (A) or (B) of this paragraph, the unit's control period heat input for such year is multiplied by 30%.

(2) for the control period beginning January 1, 2016, and for the control period beginning every five years thereafter, the baseline heat input must be adjusted to reflect the average of the three highest amounts of the unit's adjusted control period heat input from control periods one through five of the preceding seven control periods with the adjusted control period heat input for each year calculated as follows:

(A) if the unit is coal-fired during the year, the unit's control period heat input for such year is multiplied by 90%;

(B) if the unit is natural gas-fired during the year, the unit's control period heat input for such year is multiplied by 50%; and

(C) if the unit is not subject to subparagraph (A) or (B) of this paragraph, the unit's control period heat input for such year is multiplied by 30%.

(b) For units commencing operation on or after January 1, 2001:

(1) for each control period in 2009 - 2014, Clean Air Interstate Rule (CAIR) oxides of nitrogen (NO_x) allowances must be allocated from the new unit set-aside identified under §101.503(b) of this title (relating to Clean Air Interstate Rule Oxides of Nitrogen Annual Trading Budget) and determined in accordance with subsection (d) of this section;

(2) for the control period beginning January 1, 2015 for units operating each calendar year during a period of five or more consecutive years, the baseline heat input is the average of the three highest amounts of the unit's total converted control period heat input over the first such five years. The converted control period heat input for each year is calculated as follows:

(A) except as provided in subparagraph (B) or (C) of this paragraph, the converted control period heat input equals the control period gross electrical output of the generator or generators served by the unit multiplied by 7,900 British thermal units per kilowatt-hour (Btu/kWh), if the unit is coal-fired for the year, or 6,675 Btu/kWh, if the unit is not coal-fired for the year, and divided by 1,000,000 Btu/MMBtu. If a generator is served by two or more units, then the gross electrical output of the generator must be attributed to each unit in proportion to the unit's share of the total control period heat input of such units for the year;

(B) for a unit that is a boiler and has equipment used to produce electricity and useful thermal energy for industrial, commercial, heating, or cooling purposes through the sequential use of energy, the converted heat input is the total heat energy (in Btu) of the steam produced by the boiler during the control period, divided by 0.8 and converted to MMBtu by dividing by 1,000,000 Btu/MMBtu; or

(C) for a unit that is a combustion turbine and has equipment used to produce electricity and useful thermal energy for industrial, commercial, heating, or cooling purposes through the sequential use of energy, the converted heat input is determined using the equation in the following figure.
Figure: 30 TAC §101.506(b)(2)(C)

(3) for the control period beginning January 1, 2016, and for the control period beginning every five years thereafter, for units operating each calendar year during a period of five or more consecutive years, the baseline heat input shall be adjusted to reflect the average of the three highest amounts of the unit's converted control period heat input from control periods one through five of the preceding seven control periods. The converted control period heat input for each year is calculated as follows:

(A) except as provided in subparagraph (B) or (C) of this paragraph, the converted control period heat input equals the control period gross electrical output of the generator or generators served by the unit multiplied by 7,900 Btu/kWh, if the unit is coal-fired for the year, or 6,675 Btu/kWh, if the unit is not coal-fired for the year, and divided by 1,000,000 Btu/MMBtu, provided that if a generator is served by two or more units, then the gross electrical output of the generator must be attributed to each unit in proportion to the unit's share of the total control period heat input of such units for the year;

(B) for a unit that is a boiler and has equipment used to produce electricity and useful thermal energy for industrial, commercial, heating, or cooling purposes through the sequential use of energy, the converted control period heat input equals the total heat energy (in Btu) of the steam produced by the boiler during the control period, divided by 0.8 and converted to MMBtu by dividing by 1,000,000 Btu/MMBtu; or

(C) for a unit that is a combustion turbine and has equipment used to produce electricity and useful thermal energy for industrial, commercial, heating, or cooling purposes through the sequential use of energy, the converted control period heat input is determined using the equation in the following figure.
Figure: 30 TAC §101.506(b)(3)(C)

(c) For units with a baseline heat input calculated under subsection (a) or (b)(2) or (3) of this section, CAIR NO_x allowances must be allocated according to the equation in the following figure.
Figure: 30 TAC §101.506(c)

(d) For units commencing operation on or after January 1, 2001, and that have not established a baseline heat input in accordance with subsection (b)(2) or (3) of this section, CAIR NO_x allowances must be allocated according to the following.

(1) Beginning with the later of the control period in 2009 or the first control period after the control period in which the CAIR NO_x unit commences commercial operation and until the first control period for which the unit is allocated CAIR NO_x allowances under subsection (c) of this section, CAIR NO_x allowances must be allocated from the new unit set-aside identified under §101.503(b) of this title. For the first control period in which a CAIR NO_x unit commences commercial operation, such CAIR NO_x unit will not receive a CAIR NO_x allocation from the new unit set-aside.

(2) To receive a CAIR NO_x allowance allocation from the new unit set-aside, the CAIR designated representative shall submit to the executive director a written request on or before July 1 of the first control period for which the CAIR NO_x allowance allocation is requested and after the date that the CAIR NO_x unit commences commercial operation.

(3) In a CAIR NO_x allowance allocation request under paragraph (2) of this subsection, the amount of CAIR NO_x allowances requested for a control period must not exceed the CAIR NO_x unit's total tons of NO_x emissions reported to EPA for the calendar year immediately preceding such control period.

(4) The executive director shall review each CAIR NO_x allowance allocation request submitted in accordance with this subsection and shall allocate CAIR NO_x allowances for each control period as follows.

(A) The executive director shall accept a CAIR NO_x allowance allocation request only if the request meets, or is adjusted as necessary to meet, the requirements of this subsection.

(B) On or after July 1 of the control period, the executive director shall determine the sum of all accepted CAIR NO_x allowance allocation requests for the control period.

(C) If the amount of CAIR NO_x allowances in the new unit set-aside for the control period is greater than or equal to the sum under subparagraph (B) of this paragraph, then the executive director shall allocate the full amount of CAIR NO_x allowances requested to each CAIR NO_x unit covered under a CAIR NO_x allowance allocation request that was accepted by the executive director.

(D) If the amount of CAIR NO_x allowances in the new unit set-aside for the control period is less than the sum under subparagraph (B) of this paragraph, then the executive director shall allocate CAIR NO_x allowances to each CAIR NO_x unit covered under a CAIR NO_x allowance allocation request accepted by the executive director according to the equation in the following figure.
Figure: 30 TAC §101.506(d)(4)(D)

(E) The executive director shall notify each CAIR designated representative who submitted a CAIR NO_x allowance allocation request of the amount of CAIR NO_x allowances, if any, allocated for the control period to the CAIR NO_x unit covered under the request.

(e) If, after completion of the procedures under subsection (d) of this section for a control period, any unallocated CAIR NO_x allowances remain in the new unit set-aside for the control period, the executive director shall allocate to each CAIR NO_x unit receiving an allocation under subsection (c) of this section an amount of CAIR NO_x allowances equal to the total amount of such remaining unallocated CAIR NO_x allowances, multiplied by the unit's allocation under subsection (c) of this section, divided by 90.5% of the NO_x trading budget identified in subsection (a) of this section, and rounded to the nearest whole allowance as appropriate.

(f) A unit's control period heat input, and a unit's status as coal-fired or natural gas-fired, for a calendar year under subsection (a) of this section, and a unit's total tons of NO_x emissions during a calendar year under subsection (d) of this section, must be determined in accordance with 40 Code of Federal Regulations (CFR) Part 75, to the extent the unit was otherwise subject to the requirements of 40 CFR Part 75 for the year, or must be based on the best available data reported to the executive director for the unit, to the extent the unit was not otherwise subject to the requirements of 40 CFR Part 75 for the year.

(g) On or before the latter of July 1, 2011, or July 1 of the control period immediately following a unit's fifth complete, consecutive year of commercial operation, the CAIR designated representative of a unit establishing a baseline heat input in accordance with subsection (b)(2) or (3) of this section shall submit, on a form specified by the executive director, written certification of the gross electrical output of the generator or generators served by the unit and the total heat energy

of any steam produced by the unit during the first five years of commercial operation.

§101.508. Compliance Supplement Pool.

(a) In addition to the Clean Air Interstate Rule (CAIR) oxides of nitrogen (NO_x) allowances allocated under §101.506 of this title (relating to Clean Air Interstate Rule Oxides of Nitrogen Allowance Allocations), the executive director may allocate for the control period in 2009 up to the amount of CAIR NO_x allowances listed as the compliance supplement pool for Texas under 40 Code of Federal Regulations (CFR) §96.143.

(b) For any CAIR NO_x unit that achieves NO_x emission reductions in 2007 and 2008 that are not necessary to comply with any state or federal emissions limitation applicable during such years, the CAIR designated representative of the unit may request early reduction credits and allocation of CAIR NO_x allowances from the compliance supplement pool under subsection (a) of this section for such early reduction credits, in accordance with the following.

(1) The owners and operators of such CAIR NO_x unit shall monitor and report the NO_x emissions rate and the heat input of the unit in accordance with 40 CFR Part 96, Subpart HH for the entire control period for which early reduction credit is requested.

(2) The CAIR designated representative of such CAIR NO_x unit shall submit to the executive director by July 1, 2009, a written request for allocation of an amount of CAIR NO_x allowances from the compliance supplement pool not exceeding the sum of the amounts, in tons, of the unit's NO_x emission reductions in 2007 and 2008 that are not necessary to comply with any state or federal emissions limitation applicable during such years, determined in accordance with 40 CFR Part 96, Subpart HH.

(c) For any CAIR NO_x unit whose compliance with the CAIR NO_x emissions limitation for the control period in 2009 would create an undue risk to the reliability of electricity supply during such control period, the CAIR designated representative of the unit may request the allocation of CAIR NO_x allowances from the compliance supplement pool under subsection (a) of this section, in accordance with the following.

(1) The CAIR designated representative of such CAIR NO_x unit shall submit to the executive director by July 1, 2009, a written request for allocation of an amount of CAIR NO_x allowances from the compliance supplement pool not exceeding the minimum amount of CAIR NO_x allowances necessary to remove such undue risk to the reliability of electricity supply.

(2) In the request under subsection (c)(1) of this section, the CAIR designated representative of such CAIR NO_x unit shall demonstrate that, in the absence of allocation to the unit of the amount of CAIR NO_x allowances requested, the unit's compliance with CAIR NO_x emissions limitation for the control period in 2009 would create an undue risk to the reliability of electricity supply during such control period. This demonstration must include a showing that it would not be feasible for the owners and operators of the unit to:

(A) obtain a sufficient amount of electricity from other electricity generation facilities, during the installation of control technology at the unit for compliance with the CAIR NO_x emissions limitation, to prevent such undue risk; or

(B) obtain under subsections (b) and (d) of this section, or otherwise obtain, a sufficient amount of CAIR NO_x allowances to prevent such undue risk.

(d) The executive director shall review each request under subsections (b) or (c) of this section submitted by July 1, 2009, and shall allocate CAIR NO_x allowances for the control period in 2009 to CAIR NO_x units covered by such request as follows.

(1) The executive director shall make any necessary adjustments to the request to ensure that the amount of the CAIR NO_x allowances requested meets the requirements of subsections (b) or (c) of this section.

(2) If the total amount of CAIR NO_x allowances in all requests, as adjusted under paragraph (1) of this subsection, is less than the amount of allowances in the compliance supplement pool under subsection (a) of this section, the executive director shall allocate to each CAIR NO_x unit covered by a request the amount of CAIR NO_x allowances requested, as adjusted under paragraph (1) of this subsection.

(3) If the total amount of CAIR NO_x allowances in all requests, as adjusted under paragraph (1) of this subsection, is more than the amount of allowances in the compliance supplement pool under subsection (a) of this section, the executive director shall allocate CAIR NO_x allowances to each CAIR NO_x unit covered by a request according to the equation in the following figure.
Figure: 30 TAC §101.508(d)(3)

(4) By November 30, 2009, the executive director shall determine, and submit to EPA, the allocations under paragraph (2) or (3) of this subsection.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 8. CLEAN AIR MERCURY RULE

30 TAC §101.601, §101.602

The Texas Commission on Environmental Quality (TCEQ or commission) adopts new §101.601 and §101.602. Section 101.602 is adopted *with changes* to the proposed text as published in the March 17, 2006, issue of the *Texas Register* (31 TexReg 1884). Section 101.601 is adopted *without changes* to the proposed text and will not be republished.

These new sections are being adopted in Subchapter H, Emissions Banking and Trading, new Division 8, Clean Air Mercury Rule. The new sections will be submitted to the United States Environmental Protection Agency (EPA) as part of the Texas State Plan for the Control of Designated Facilities and Pollutants.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

On May 18, 2005, EPA finalized the clean air mercury rule (CAMR) to permanently cap and reduce mercury emissions from new and existing coal-fired electric generating units (EGUs) nationwide. The mercury reduction requirements under CAMR will be implemented in two phases by providing states with declining budgets. Phase I begins in 2010 and continues through the year 2017. During those years Texas will receive an annual

mercury budget of 4.657 tons. The Phase II mercury budget will begin in 2018 and Texas will receive an annual budget of 1.838 tons that year and each year thereafter. EPA provided states with two compliance options for meeting the reduction requirements under CAMR: 1) meet the state's emission budget by requiring new and existing coal-fired EGUs to participate in an EPA-administered cap and trade system; or 2) meet an individual state emissions budget through measures of the state's choosing. During the 79th Legislature, 2005, the legislature enacted House Bill 2481 requiring Texas to participate in the EPA-administered interstate cap and trade program through the incorporation by reference of the CAMR model trading rule.

House Bill (HB) 2481 amended Texas Health and Safety Code (THSC), Chapter 382 by adding 382.0173.THSC, §382.0173(a) requires that the commission adopt rules "incorporat{ing} by reference 40 CFR Subparts AA through II and Subparts AAA through III of Part 96 and 40 CFR Subpart HHHH of Part 60." Additionally, THSC, §382.0173(b) requires the commission to "make permanent allocations that are reflective of the allocation requirements of 40 CFR Subparts AA through HH and Subparts AAA through HHH of Part 96 and 40 CFR Subpart HHHH of Part 60 . . . at no cost . . . using the {EPA's} allocation method as specified by Section 60.4142(a)(1)(I), as issued by that agency on May 12, 2005, or 40 CFR Section 96.142(a)(1)(I), as issued by that agency on May 18, 2005, as applicable with the exception of nitrogen oxides which shall be allocated according to the additional requirements of Subsection (c)." THSC, §382.0173(c) provides additional requirements regarding nitrogen oxides (NO_x) allocations, specifically a requirement to maintain a special reserve of allocations for certain units, and requirements relating to establishing allocations for specific control periods. THSC, §382.0173(d) provided that its provisions applied only while the federal rules were enforceable and that the provisions of House Bill 2481 do "not limit the authority of the commission to implement more stringent emissions control requirements."

The commission interprets these requirements together in order to provide effect to the expressed intent of the legislature. Specifically, the commission interprets the language of new THSC, §382.0173(d) as not restricting existing authority to require further emissions control requirements, but not to interfere with, or change, the requirements of the Clean Air Interstate Rule (CAIR) nitrogen oxides and sulfur dioxide (SO_2), or the CAMR mercury emission trading programs. The legislature expressed clear intent that the commission implement the CAIR and CAMR emission trading programs by requiring the incorporation by reference of the CAIR and CAMR program rules as promulgated by EPA, and requiring the use of EPA-specified allocation methodology, with some exceptions for CAIR nitrogen oxides allowances.

The CAMR model trading rule, under 40 Code of Federal Regulations (CFR) Part 60, Subpart HHHH, is a market-based cap and trade system designed to reduce the costs of complying with the new mercury reduction requirements. The Mercury Budget Trading Program caps nationwide annual mercury emissions by providing each state with an annual emissions budget to be applied to all coal-fired boilers and turbines serving an electrical generator with a nameplate capacity greater than 25 megawatts of electricity (MWe) and producing electricity for sale. The trading rule provides flexibility in complying with the mercury reduction requirements through unrestricted banking of excess allowances and the trading of allowances between EGUs nationwide. States participating in the interstate trading program therefore are not subject to individual state caps. Under the model rule, states are provided flexibility in the allocation methodology used to determine mercury allowance allocations for each mercury budget unit. States are then responsible for submitting the allowance allocations to EPA for recordation. Under the CAMR model rule, EPA establishes mercury compliance accounts for each mercury budget source and maintains an allowance tracking system to record the deposit, transfer, and deduction for compliance of all mercury allowances. The mercury budget sources are required, under the model rule, to demonstrate compliance through the installation and operation of continuous emissions monitoring systems as required under 40 CFR Part 75. Finally, the model rule requires all elements of the Mercury Budget Trading Program to be federally enforceable through the issuance of a mercury budget permit as a complete and separable portion of each mercury budget source's Title V permit.

As directed by House Bill 2481, §2 (codified in THSC, §382.0173), the commission is adopting under Subchapter H, new Division 8 of Chapter 101 to incorporate 40 CFR Part 60, Subpart HHHH, by reference for the purpose of complying with the CAMR.

SECTION BY SECTION DISCUSSION

Section 101.601, Applicability

The adopted new §101.601 states that the requirements of Chapter 101, Subchapter H, Division 8, apply to any stationary, coal-fired boiler or stationary, coal-fired combustion turbine meeting the applicability requirements under 40 CFR §60.4104. The referenced applicability requirements under 40 CFR §60.4104 apply to stationary, coal-fired boilers or combustion turbines serving at any time, since the startup of the unit's combustion chamber, a generator with a nameplate capacity of more than 25 MWe producing electricity for sale. The referenced applicability requirements also include cogeneration units serving at any time a generator with nameplate capacity of more than 25 MWe and supplying in any calendar year more than one-third of the unit's potential electric output capacity or 219,000 megawatt-hour (MWh), whichever is greater, to any utility power distribution system for sale.

Section 101.602, Clean Air Mercury Rule Trading Program

The adopted new §101.602 incorporates by reference the CAMR trading program for mercury codified under 40 CFR Part 60, Subpart HHHH, finalized on May 18, 2005. The section requires owners and operators of sources subject to 40 CFR Part 60, Subpart HHHH, to comply with the requirements of that subpart. Based on comment, §101.602(a) was revised to remove the phrase "except as specified in this division" because the additional language is unnecessary since nothing elsewhere in the division contradicts the incorporated federal rule.

The requirements of 40 CFR Part 60, Subpart HHHH, establish the Mercury Budget Trading Program of the CAMR. Specifically, the rules under Subpart HHHH outline a model cap and trade program that may be adopted by states to comply with CAMR. The rules provide for the applicability of the Mercury Budget Trading Program to stationary, coal-fired boilers and combustion turbines serving a generator with a nameplate capacity greater than 25 MWe producing electricity for sale. The Mercury Budget Trading Program provides for an exemption from the program's permitting, monitoring, and reporting requirements for retired units. Retired units continue to receive mercury allowance allocations. The model trading rule outlines standard requirements for each mercury budget source and mercury budget unit, including the requirements to obtain a mercury budget permit;

comply with the monitoring, reporting, and recordkeeping requirements of 40 CFR §§60.4170 - 60.4176; and hold mercury allowances not less than the amount of total mercury emissions for each control period, January 1 through December 31 of each calendar year. The requirements under 40 CFR §§60.4110 - 60.4114 describe the procedures for the authorization of a mercury designated representative, the representative's responsibilities, and the responsibilities of both the mercury designated representative and alternate mercury designated representative for a mercury budget source. The mercury designated representative or alternate represents and, through its representations, actions, inactions, or submissions, legally binds each owner and operator of a mercury budget source in all matters pertaining to the Mercury Budget Trading Program. For each mercury budget source required to have a Title V operating permit, 40 CFR §§60.4120 - 60.4124 describe the requirements for each mercury budget source to apply for and obtain a mercury budget permit containing all applicable Mercury Budget Trading Program requirements for each mercury budget unit at the source.

State trading budgets and the methodology and procedures for allocating mercury allowances are provided under 40 CFR §§60.4140 - 60.4142. State budgets are provided in two phases, with Phase I beginning in 2010 and continuing through the year 2017. In each Phase I year, Texas will receive a mercury budget of 4.657 tons. The Phase II mercury budget will begin in 2018, with Texas receiving 1.838 tons in 2018 and each year thereafter. Mercury allowance allocations, in ounces, will be distributed to each mercury budget unit in accordance with the methodology outlined under 40 CFR 60.4142. For units commencing operation before January 1, 2001, mercury allowances are allocated based on the average of the three highest amounts of heat input, in million British thermal units (mmBtu), from calendar years 2000 through 2004 adjusted for the type of coal burned. The coal type adjustment is performed by multiplying the respective portion of the unit's baseline heat input for the year by the following: 3.0 for lignite, 1.25 for subbituminous, and 1.0 for all other coal types. Units commencing operation on or after January 1, 2001, and operating each calendar year for a period of five or more consecutive years will not be eligible for an allocation from the new unit set-aside and will receive their mercury allowance allocation from the general mercury trading budget on a modified output basis. The baseline heat input is the average of the three highest amounts of the unit's total converted control period heat input from the first five years of operation. In calculating a unit's converted control period heat input on a modified output basis, the unit's gross electrical output is multiplied by a heat rate conversion factor of 7,900 British thermal units per kilowatt-hour (Btu/kWh). For cogeneration units, the converted heat input is calculated by converting the available thermal output, in Btu, of useable steam to an equivalent heat input by dividing the thermal output by a general boiler/heat exchanger efficiency of 80%. For combustion turbine cogeneration units, the converted heat input is calculated by converting the available thermal output of useable steam from the heat recovery steam generator or heat exchanger to an equivalent heat input by dividing the thermal output by a general boiler/heat exchanger efficiency of 80%. To this, the electrical generation from the combustion turbine is added after conversion to an equivalent heat input by multiplying the electrical output by 3,413 Btu/kWh. The sum yields the total equivalent heat input for the combustion turbine cogeneration unit.

The model rule provides for each state to set aside a portion of its annual allowance allocation for units newly beginning operation. The model rule allocation methodology allocates a total amount of mercury allowances for the 2010 through 2014 control periods equal to 95% of the Texas mercury trading budget to each mercury budget unit with a baseline heat input determined under 40 CFR §60.4142(a). The allocation will be made in proportion to each mercury budget unit's share of baseline heat input compared to the total baseline heat input for all mercury budget units with a baseline heat input determined under 40 CFR §60.4142(a). Beginning with the 2015 control period, and for each control period thereafter, a total amount of mercury allowances equal to 97% of the mercury trading budget will be allocated to each mercury budget unit with a baseline heat input determined under 40 CFR §60.4142(a) in proportion to each mercury budget unit's share of baseline heat input compared to the total baseline heat input for all mercury budget units with a baseline heat input determined under 40 CFR §60.4142(a).

The model allocation methodology requires the executive director to distribute mercury allowances from the new unit set-aside upon receipt of a request from the mercury budget designated representative for the mercury budget unit. Submittal of each request for a mercury allowance allocation from the new unit set-aside is required on or before July 1 of the first control period for which the request is being made and after the date on which the mercury budget unit commences commercial operation. Mercury allowances requested from the new unit set-aside will not be allocated in excess of the new unit's total tons of mercury emissions reported to EPA for the previous control period. On or after July 1 of each control period, the executive director shall review each mercury allowance allocation request, determine the sum of all such requests, and allocate mercury allowances from the new unit set-aside for the control period. If the amount of mercury allowances in the new unit set-aside is greater than or equal to the sum of all allowances requested, then the executive director shall allocate the amount of mercury allowances requested. If the amount of mercury allowances in the new unit set-aside is less than the sum of all allowances requested, then the executive director shall allocate to each mercury budget unit covered under a request an amount of allowances in proportion to the amount of allowances requested by a mercury budget unit compared to the total amount of allowances requested by all mercury budget units. In the adopted allocation methodology, new units begin receiving allowances from the set-aside for the control period immediately following the control period in which the new unit commences commercial operation, based on the unit's emissions reported for the previous control period. Therefore, a mercury budget source operating a new unit is required to hold allowances covering the emissions from the new unit for the control period in which the new unit commences commercial operation, but will not receive an allocation for that control period. Mercury allowance allocations for a new unit in subsequent control periods will continue to be based on the unit's emissions from the previous control period until the unit establishes a baseline in accordance with 40 CFR §60.4142(a)(1)(ii). All mercury allowance allocations under the adopted allocation methodology are rounded to the nearest whole allowance.

The model rule allows for the distribution of any unallocated mercury allowances remaining in the new unit set-aside for a given control period to mercury budget units with a historical baseline heat input receiving an allocation under 40 CFR §60.4142(b). This distribution is performed by multiplying the amount of unallocated allowances remaining in the set-aside by each mercury

budget unit's allocation determined under 40 CFR §60.4142(b), divided by 95% of the Texas mercury trading budget for 2010 to 2014, and divided by 97% for 2015 and thereafter.

The model rule also requires, for the purposes of determining allowance allocations, a mercury budget unit's control period heat input and total ounces of mercury emissions during each calendar year to be determined in accordance with the continuous emission monitoring requirements of 40 CFR Part 75 to the extent that the unit was otherwise subject to those requirements for the year. If a mercury budget unit commencing operation before January 1, 2001, was not otherwise subject to the requirements of 40 CFR Part 75 for any given year, the unit's control period heat input, status as coal-fired or natural gas-fired, and total ounces of mercury emissions during a calendar year will be based on the best available data reported to the executive director. The types and amounts of fuel combusted by such a mercury budget unit will also be based on the best available data reported to the executive director.

The model trading rule requires the executive director to submit to EPA by October 31, 2006, the mercury allowance allocations for the 2010 through 2014 control periods for mercury budget units with a historical baseline heat input determined under 40 CFR §60.4142(a). Subsequently, by October 31, 2008, and October 31 of each year thereafter, the model rule requires submittal to EPA of the mercury allowance allocations for mercury budget units with a historical baseline heat input determined under 40 CFR §60.4142(a) for the control period beginning in the sixth year after the year of the applicable submittal deadline. For example, the mercury allowance allocations determined under 40 CFR §60.4142(a) for the 2015 control period shall be submitted to EPA by October 31, 2008. The model rule also describes the actions EPA may take should the executive director fail to submit the mercury allowance allocations by the applicable deadlines. If the mercury allowance allocations are not provided to EPA by the applicable deadlines in 40 CFR §60.4141(b)(1) for each control period, EPA will assume the mercury allowance allocations for the applicable control period are the same as for the immediately preceding control period. If the applicable control period for which the allowance allocation is not submitted is 2018, EPA will assume the mercury allowance allocations equal the allocations for the 2017 control period multiplied by the state trading budget for Phase II and divided by the state trading budget for Phase I. Finally, by October 31, 2010, and October 31 of each year thereafter, the executive director is required to submit to EPA the mercury allowance allocations distributed from the new unit set-aside under 40 CFR §60.4142(c) and (d) for that control period. If the executive director fails to submit the allowance allocations by the applicable deadline in 40 CFR §60.4141(c)(1) for each control period, EPA will assume that no allowances are to be allocated for the applicable control period to any mercury budget unit that is otherwise receiving an allocation from the new unit set-aside.

The mercury allowance tracking system; methods for establishing compliance accounts and general accounts; the recording of mercury allowance allocations into a mercury budget source's compliance account; the procedures for deducting allowances for compliance; and the banking of mercury allowances are outlined under 40 CFR §§60.4151 - 60.4157. The Mercury Budget Trading Program allows for the unlimited banking of excess allowances. Deductions for compliance are based on the monitoring and reporting requirements under 40 CFR §60.4154 with "penalty" deductions for emissions in excess of the amount of allowances held in a compliance account being equal to three times the number of ounces emitted in excess. The procedures for the submission and recordation of mercury allowance trades are outlined under 40 CFR §§60.4160 - 60.4162. The model rule, under 40 CFR §§60.4170 - 60.4176, requires mercury budget units to meet the continuous emissions monitoring requirements under 40 CFR Part 75 and outlines the initial certification and recertification procedures for monitoring systems, as well as the applicable recordkeeping and reporting requirements.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that it meets the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The rulemaking does not, however, meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The adopted rulemaking incorporates by reference the federal CAMR emissions trading rules located in 40 CFR Part 60, Subpart HHHH. 42 United States Code (USC), §7411 creates a system for the establishment of standards of performance to reduce emissions from stationary sources. The CAMR establishes standards of performance for mercury emissions from new and existing coal-fired EGUs. 40 CFR Part 60, Subpart HHHH, creates a trading program for EGUs that will provide a mechanism to meet the mercury standards by capping and then reducing emissions over time. Facilities will demonstrate compliance with the standard by holding one allowance for each ounce of mercury emitted each year. EPA has determined that the cap and trade approach to limiting mercury emissions is the most cost-effective way to achieve reductions. However, states may elect not to participate in the trading program and adopt other strategies to meet their state budgets, which would function as caps in those states. If states choose to participate in the cap and trade program, as has Texas, they must adopt the model rule. The model rule provides an example allowance allocation methodology, which Texas has adopted. The CAMR is designed to achieve initial mercury reductions through implementation of the federal CAIR. The CAIR also imposes cap and trade programs on EGUs that will reduce emissions of sulfur dioxide and oxides of nitrogen. Emission controls installed to comply with CAIR will achieve mercury reductions as a co-benefit during the first phase of the mercury trading program.

This adopted rulemaking fulfills the requirements of House Bill 2481 to incorporate CAMR by reference and to specify the sources to which the trading program is applicable. The incorporation of CAMR will require emission reductions from certain new

and existing stationary coal-fired electric utility units, including boilers and combustion turbines, and certain cogeneration units that meet specific applicability criteria. The incorporation of the federal rule is intended to protect the environment and to reduce risks to human health and safety from environmental exposure to mercury. The required emissions reductions are based on controls that are known to be highly cost-effective for EGUs, but the requirements may have adverse impacts on certain utilities, which could be considered a sector of the economy. The exact cost for each unit cannot be predicted, but significant costs to comply with the emission reduction requirements may be expected for at least some units that install or upgrade emission controls or that purchase allowances. The adopted rulemaking may adversely affect in a material way sources in the state that fall under the applicability requirements in the federal rule. The cost and benefits of the CAMR were analyzed by EPA during the federal notice and comment rulemaking for the CAMR. CAMR is a required federal standard, and the ability of states to modify its requirements is limited.

The adopted rulemaking implements the requirements of the Federal Clean Air Act (FCAA). Under 42 USC, §7411(b)(1)(A), EPA must establish a list of stationary source categories that it has determined "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 USC, §7411(b)(1)(B), then requires EPA to set national standards of performance for new sources within each listed source category. Standards of performance for existing sources of pollutants in the same source categories must then be issued. Under 42 USC, §7411(d), EPA is authorized to promulgate standards of performance that states must adopt through a state implementation plan (SIP)-like process, which requires state rulemaking action followed by review and approval by EPA under 40 CFR Part 60 Subpart B, Adoption and Submittal of State Plans for Designated Facilities.

Under 42 USC, §7411, states such as Texas that have been delegated the authority to enforce the FCAA must enforce performance standards for new and existing sources of mercury emissions. New sources must comply with Standards of Performance for New Stationary Sources (NSPS) for mercury, as promulgated in the CAMR. In addition, new sources will be covered under the mercury cap of the trading program, and will be required to hold allowances equal to their emissions. For existing sources, 42 USC, §7411, requires EPA to "prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title (SIPs) under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant . . . to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance." While 42 USC, §7411, like §7410 (SIPs), does not require specific programs, methods, or reductions in order to meet the standard, state plans must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet emission standards. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for meeting the standards. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7411. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of 42 USC, §7411, and must develop strategies to assure that the emission standards for new and existing sources are met. Adoption of the federal rule and participation in its emissions cap and trade approach for mercury emissions is the method the state has chosen to achieve those reductions in a flexible and cost-effective manner.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill 633 during the 75th legislative session. The intent of Senate Bill 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for Senate Bill 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeded a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet emission standards; thus, states must develop strategies to help ensure that those standards for new and existing sources are met. Because of the ongoing need to address both national ambient air quality standards for criteria pollutants and NSPS and existing source standards for designated pollutants, the commission routinely proposes and adopts SIP rules and 42 USC, §7411 rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP or the 42 USC, §7411 plans was considered to be a major environmental rule that exceeds federal law, then every SIP rule and 42 USC, §7411 rule would require the full regulatory impact analysis contemplated by Senate Bill 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of Senate Bill 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the 42 USC, §7411 rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted to implement and enforce the federal standards of performance and 42 USC, §7411 state plan fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but

left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." (*Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978)).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of the adopted rules is to adopt and incorporate by reference the federal CAMR emissions trading rules, with the objective to protect the environment and to reduce risks to human health. The adopted rules do not exceed a standard set by federal law or exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this rulemaking. Finally, this rulemaking was not developed solely under the general powers of the agency, but is required by the Texas Clean Air Act, as codified in THSC, §382.0173. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because, although the adopted rules meet the definition of a "major environmental rule," they do not meet any of the four applicability criteria for a major environmental rule.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the adopted rulemaking is to incorporate by reference the federal CAMR emissions trading rules, located in 40 CFR Part 60, Subpart HHHH. Subpart HHHH establishes a mercury emissions cap and trade program for new and existing coal-fired EGUs, for which standards of performance have been promulgated under 42 USC, §7411. During the 79th Legislature, 2005, the legislature enacted House Bill 2481, which created a requirement in the Texas Clean Air Act, codified in THSC, §382.0173, to adopt the federal program rules by reference. Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to this adopted rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law and by state law.

In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007, does not apply to these adopted rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). EPA promulgated federal standards of performance for mercury emissions to reduce presently uncontrolled emissions of mercury. The adopted rules will enable Texas to implement the federal cap and trade program and impose its requirements on new and existing EGUs, ultimately ensuring reductions of mercury emissions into the environment. The action will specifically advance the health and safety purpose by reducing mercury levels through an emissions cap and gradual reductions in emissions. The rules specifically target a category of sources with significant mercury emissions, and through the cap and trade program support cost-effective control strategies. Consequently, the adopted rules meet the exemption criteria in Texas Government Code, §2007.003(b)(13). This rulemaking therefore meets the exemptions in Texas Government Code, §2007.003(b)(4) and (13). For these reasons, Chapter 2007 does not apply to this adopted rulemaking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq*.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). No new sources of air contaminants will be authorized and the adopted rules will maintain at least the same level of or increase the level of emissions control. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.32). This rulemaking action complies with 40 CFR Part 60, Standards of Performance for New Stationary Sources. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The requirements of 42 USC, §7410, are applicable requirements of 30 TAC Chapter 122. Facilities that are subject to the Federal Operating Permits Program will be required to obtain, revise, reopen, and renew their federal operating permits as appropriate in order to include CAMR.

PUBLIC COMMENT

The commission conducted public hearings on the proposed rules on April 11, 2006, in Austin; April 12, 2006, in Fort Worth; and April 13, 2006, in Houston. During the public comment period, which closed at 5:00 p.m., April 17, 2006, the commission received comments from Association of Electric Companies of Texas, Inc. (AECT); Austin Physicians for Social Responsibility

(APSR); Clean Water Action (CWA); Downwinders at Risk Education Fund; Entergy Services Inc. (Entergy); Environment Texas; FPL Group (FPL); Greater Houston Area Smog Prevention (GHASP); Gulf Coast Lignite Coalition (GCLC); League of Women Voters of Texas (LWV); NRG Texas (NRG); Public Citizen; Representative Dennis Bonnen, District 25; Senator Ken Armbrister, District 18; Sierra Club of Dallas-Fort Worth (DFW Sierra Club); Sierra Club - Houston Regional Group (Houston Sierra Club); Southwestern Public Services (SPS); Suez Energy Generation NA, Inc. (SEGNA); Texas Association of Business (TAB); Texas Impact; Texas Mining and Reclamation Association (TMRA); Texas Campaign for the Environment (TCE); The Sustainable Energy and Economic Development Coalition (SEED); TXU Power (TXU); Working Effectively for Clean Air Now (WECAN); and 140 individuals.

NRG supported comments submitted by GCLC; TMRA supported comments submitted by AECT and GCLC; GCLC supported comments submitted by TMRA and AECT; and Entergy and TXU supported comments submitted by AECT.

TXU, Entergy, AECT, and SPS concurred with Representative Bonnen's comments.

RESPONSE TO COMMENTS

MORE STRINGENT CONTROLS

SEED, Public Citizen, TCE, Downwinders at Risk, WECAN, Environment Texas, LWV, APSR, CWA, Texas Impact, GHASP, and 56 individuals requested that the commission adopt rules more stringent than the federal rules by requiring a 90% reduction in mercury emissions from coal-fired power plants by the year 2010. In addition, the commenters stated that the goal of the commission should be a total phase-out of mercury emissions from utilities. Texas Impact commented that toxic emissions threaten to stifle growth and development in Texas.

The rules have not been revised in response to this comment. Under House Bill 2481, 79th Legislature, 2005, the commission was directed to adopt and incorporate by reference 40 CFR Part 60, Subpart HHHH, thus requiring the commission to allocate the mercury budget as provided under the federal CAMR model trading rule. Therefore, the commission does not have the authority to require additional mercury reductions from coal-fired EGUs in conjunction with implementing CAMR.

Representative Dennis Bonnen and Senator Armbrister commented that the legislature did not intend Section 2 of HB 2481 to be interpreted to allow more stringent emission control requirements in the TCEQ rules adopting the federal CAMR.

The commission appreciates the information provided by Representative Bonnen and Senator Armbrister.

SEED, Public Citizen, TCE, Downwinders at Risk, WECAN, Environment Texas, CWA, and 127 individuals requested that the timeline for mercury reductions be accelerated to require reductions from EGUs to be met by 2010. GCLC and TMRA commented that the commission should reject any request to accelerate the timeline for complying with the proposed mercury reductions due to the technical and logistical constraints with retrofitting the appropriate control equipment on existing lignite-fired units.

The rules have not been revised in response to this comment. Under House Bill 2481, 79th Legislature, 2005, the commission was provided specific direction to adopt and incorporate by reference 40 CFR Part 60, Subpart HHHH. Based on this legislative directive, the commission must adhere to the timelines established by EPA under the federal CAMR model trading rule for mercury. Under the federal CAMR model trading rule, Phase I mercury reductions will result from NO_x and SO_2 controls initially implemented in 2009 and 2010 under the CAIR. The commission does not have the authority to accelerate the timelines for coal-fired EGUs to comply with these emission reduction requirements.

SEED, Public Citizen, TCE, Downwinders at Risk, WECAN, Environment Texas, LWV, CWA, DFW Sierra Club, and 43 individuals commented that the commission was provided the authority under HB 2481 to implement more stringent mercury controls than those required under the federal rules. SEED commented, and provided information to support its comment, that other states are implementing more stringent mercury standards than is Texas. AECT, Entergy, GCLC, NRG, SPS, TMRA, and TXU commented that HB 2481 does not provide the commission with the authority in implementing the federal CAMR program to impose more stringent mercury control requirements than those required under the federal rule.

The commission has made no changes in response to these comments. The Texas Legislature, during the 79th Legislative Regular Session, 2005, enacted House Bill 2481, which requires the commission to participate in the EPA-administered cap and trade program for mercury by incorporating the federal CAMR by reference. HB 2481 also provided that its provisions applied only while the federal rules were enforceable and that its provisions did not limit the authority of the commission to implement more stringent emissions control requirements. As indicated in the proposal preamble, the commission interprets these requirements together in order to provide effect to the expressed intent of the legislature. Specifically, the commission continues to interpret the language of new THSC, §382.0173(d) as not restricting existing authority to require further emission control requirements, but not to interfere with, or change, the requirements of the CAMR mercury trading program.

The legislature expressed clear intent that the commission implement the CAMR model trading program by requiring the incorporation by reference of the CAMR program rules as promulgated by EPA. Those rules include a mercury allowance allocation methodology in 40 CFR §60.4142 that the commission is adopting as part of the trading program, requiring the use of EPA-specified allocation methodology. Requiring more stringent mercury reductions than required by the federal CAMR would not be in accord with the statutory requirement to incorporate the CAMR by reference, which specifies the emission budget for mercury in 40 CFR §60.4140 in two phases, 2010 - 2017 and 2018 and thereafter. By requiring the commission to incorporate the federal rule by reference, the commission must also incorporate the allocation methodology and the emission budget contained in the federal CAMR in 40 CFR Part 60.

AECT, Entergy, FPL, GCLC, NRG, SPS, TAB, TMRA, and TXU commented in support of the proposed rule and opposed any revisions to the rule imposing more stringent mercury emission requirements than those required under the federal rule. GCLC and TMRA commented that the legislative directive provided to the commission under HB 2481 is grounded in sound science and based on available control technologies. Lignite coals contain high amounts of elemental mercury which is the hardest form of mercury to capture and control. The adoption of mercury reductions that cannot be met through technologically feasible and commercially available controls threatens the viability of lignite

as an electric generation fuel. TAB commented that regulatory certainty afforded by adoption of the federal rule in Texas will increase economic development.

The commission appreciates the support. As discussed elsewhere in this preamble, House Bill 2481, 79th Legislature, 2005, specifically directed the commission to adopt and incorporate by reference 40 CFR Part 60, Subpart HHHH, thus requiring the commission to allocate the mercury budget as provided under the federal CAMR rule. Therefore, the commission does not have the authority to require additional mercury reduction requirements for coal-fired EGUs in conjunction with implementing CAMR.

Houston Sierra Club commented that CAMR should be implemented in Texas as specified by the legislature via an incorporation by reference of the federal CAMR model trading rule. However, through the commission's authority to protect public health, welfare, safety, and the environment, the commission should require through future rulemaking further reductions in mercury emissions that result in an 80% to 90% total mercury reduction, with the overall goal being a total phase-out of mercury emissions.

The commission has made no changes in response to this comment. Decisions regarding future rulemaking activities must be properly made in those future actions, after public notice and comment.

HEALTH IMPACTS

SEED, Public Citizen, TCE, Downwinders at Risk, WECAN, Environment Texas, APSR, DFW Sierra Club, Texas Impact, and 124 individuals commented that the federal CAMR rule is insufficient to protect human health. SEED provided information regarding studies about health effects of mercury. These groups and individuals are specifically concerned about autism and brain development in prenatally exposed children, in addition to other health impacts. One individual noted that it is possible that lower levels of mercury exposure could be toxic, and that, more likely than not, there is no safe blood level of mercury. Stronger protections are recommended.

The commission has made no changes in response to this comment. As discussed elsewhere in this preamble, the adopted rules are designed to implement the federal CAMR program. Exhaustive health effects analyses were conducted as part of the federal rulemaking process that resulted in the CAMR. (See the discussions regarding studies conducted and reviewed by EPA in the proposed and adopted federal rules, links to which may be found at *http://www.epa.gov/air/mercuryrule/rule.htm*.) These analyses focused on health effects in fetuses, children, and adults. EPA also prepared an analysis of the final rule entitled "Regulatory Impact Analysis of the Final Clean Air Mercury Rule" in which the results of these health effects studies are discussed. Links to this document and to many others containing EPA's public health analyses may be found at *http://www.epa.gov/ttn/atw/utility/utiltoxpg.html*.

The commission agrees that mercury is a toxin that can lead to neurological deficits in children and adults. However, the levels at which these toxicities occur is significantly above blood mercury levels in the United States. EPA updated the Reference Dose (RfD) for methylmercury in 2001. The RfD is set at a concentration to protect the most sensitive population (developing fetuses) from the most sensitive health effect (neurological deficit) over a lifetime of exposure. To develop the RfD, EPA used an extensive epidemiological study conducted in the Faroe Islands on a group of natives who consume large amounts of fish and whale blubber over a lifetime. The benchmark dose lower limit or BMDL was derived by first identifying a measurable (5%) adverse change that correlated to cord blood mercury levels and then determining the lower 95% limit of this concentration. The National Research Council recommended a BMDL of 58 parts per billion (ppb) mercury in cord blood based on significant effects measured on the Boston Naming Test. The dose was then converted from cord blood levels to ingested maternal levels. Assuming a 1:1 ratio between cord and maternal blood concentrations, this value was calculated to be 1.081 micro grams (µg) mercury/kilogram (kg) body weight/day. This value was then divided by an uncertainty value of 10 to account for variability, including potential differences between cord blood and maternal blood mercury levels and interindividual variability in mercury metabolism, as well as potential long-term effects not yet measured by this study. Ultimately, a value of 0.1 µg mercury/kg body weight/day (5.8 ppb) was set as the RfD to protect against neurological effects over a lifetime. According to the 1999 - 2000 National Health and Nutrition Examination Survey, the average mercury concentration in women of childbearing age (16 - 49 years) is 1.02 ppb, well below the conservative RfD value of 5.8 ppb. Approximately 5 - 8% of women in the United States have blood mercury levels greater than 5.8 ppb. However, very few, if any, women have blood mercury levels above the BMDL of 58 ppb. In addition, no studies to date have shown a causal relationship between mercury exposure and autism incidence. In fact, the only case-control study published in the peer-reviewed literature by Ip, *et al*. in 2004 indicated no causal relationship between mercury and autism. Therefore, the commission agrees that control of mercury from coal-burning power plants is beneficial, but disagrees that the federal CAMR rule is insufficient to protect human health.

An individual commented that no specific and appropriate public health measures currently exist to evaluate health effects resulting from coal-fired power plants. SEED commented that regional routine testing of fish should be required as part of permitting.

The commission has made no change in response to this comment. The commission agrees that no public health measures are currently underway in Texas to evaluate the health effects of mercury from coal-fired power plants. However, the commission is not authorized to require state hospitals and/or doctors to report specific symptoms or health effects that are potentially related to environmental contaminants. In addition, although correlations may occur between reported symptoms and environmental exposure, no direct causal relationship can be identified.

Compliance with CAMR will be determined according to the monitoring, reporting, recording, and testing requirements of the Acid Rain program, which are outlined and described in both the CAIR and CAMR.

LWV and GHASP commented that ESLs should be set at enforceable levels based on what is in the airshed now and what might be added in the future in order to protect public health.

The commission has made no change in response to this comment. As discussed elsewhere in this preamble, the adopted rules are designed to implement the federal CAMR program and not to develop effects screening levels (ESLs). There is currently an ESL for mercury. The methodology for developing ESLs recently underwent a peer-review process and public comment period. When the methodology is finalized, the current mercury ESL will be reviewed accordingly and will be available for public comment.

TRADING

SEED, Public Citizen, TCE, Downwinders at Risk, WECAN, Environment Texas, CWA, DFW Sierra Club, Texas Impact, and 45 individuals commented that trading of mercury should be prohibited under the adopted rules, and that the trading of toxics has never before been allowed and should not be allowed with mercury. However, if trading must be allowed, it should be limited to within set regions of the state. Additionally, all parties of such trading should be jointly and severably liable for all emissions violations with financial penalties levied against all facilities of the companies involved in the trade.

The rules have not been revised in response to this comment. As discussed elsewhere in this preamble, the commission was provided specific direction by the legislature under HB 2481 to adopt and incorporate by reference the federal CAMR model trading rules, thus requiring EGUs in Texas to participate in the EPA-administered cap and trade program for mercury. In incorporating by reference the federal trading rules, EPA does not provide states with the flexibility to limit or prohibit interstate trading. Based on legislative direction and the federal rule requirements, the commission does not have the authority to prohibit or limit the trading of mercury allowances under the Mercury Budget Trading Program.

In addition, the federal CAMR model trading rule sets forth a specific penalty for sources that produce emissions in excess of the number of mercury allowances in their compliance account. The penalty provision under the federal CAMR model trading rule requires the deduction of mercury allowances to be allocated in the control period immediately following the exceedance equivalent to three times the number of ounces emitted in excess. This penalty does not preclude formal enforcement action by the commission or financial penalties resulting from such enforcement action. The commission disagrees with the commenter, however, that all parties involved in a trade should be held jointly liable. It is unreasonable to hold the seller of allowances responsible for the actions of another party over which the seller has no operational control.

SEED, Public Citizen, TCE, Downwinders at Risk, WECAN, Environment Texas, and 45 individuals commented that the proposed cap and trade program will allow utilities to buy their way out of making the required reductions, possibly resulting in no mercury reductions from utilities in Texas, and will result in mercury hot spots. SEED commented that Northeast Texas is a hot spot and that an Ohio study shows that mercury deposition occurs within 400 miles of coal-burning power plants. DFW Sierra Club commented that Texas leads the nation in both global warming and mercury emissions and that Northeast Texas is a hot spot. TCE commented that Texas is one of the worst states for all types of pollution and that the Trinity River is a virtual dead zone. CWA commented that the closer a waterway is to a power plant that discharges mercury, the more likely it is to be impaired with mercury. CWA and Environment Texas commented that numerous waterways in Texas are impaired as indicated by the quantity of mercury in fish tissue. GCLC and TMRA commented that the proposed rule will not result in utility attributable hot spots because the form of mercury found in the lignite coals in Texas, elemental mercury, does not deposit locally. GCLC and TMRA stated that the proposed rules will decrease the mercury deposition in Texas.

The rules have not been revised in response to this comment. As discussed elsewhere in this preamble, the adopted rules are designed to implement the federal CAMR program, as required by statute. A cap and trade program, when properly implemented and enforced, is an effective means of achieving overall emission reductions by encouraging the most cost-effective reductions to be implemented first. In addition, in finalizing the CAMR, EPA has deemed that a cap and trade approach to limiting mercury emission is the most cost-effective way to achieve reductions from the power sector. The commission acknowledges that, under a cap and trade approach, some sources may purchase allowances to comply rather than install additional controls; however, the imposed cap is finite and will require mercury reductions to occur.

In addition, EPA has defined a "utility hot spot" as "a waterbody that is a source of consumable fish with Methylmercury tissue concentrations, attributable solely to utilities, greater than the EPA's Methylmercury water quality criterion of 0.3 mg/kg." Based on this definition, EPA conducted modeling of utility mercury deposition before and after the implementation of both CAIR and CAMR, and concluded that there was no evidence of utility hot spots resulting from implementation of these rules. Concerns about global warming emissions are outside the scope of this rulemaking.

MISCELLANEOUS

SEED, Public Citizen, TCE, Downwinders at Risk, WECAN, and Environment Texas commented that affordable control technologies are already available and have been proven effective at reducing mercury emissions, even for lignite-fired utilities. SEED, Public Citizen, TCE, Downwinders at Risk, WECAN, Environment Texas, and 44 individuals commented that all new proposed coal-fired power plants should be required to use the latest mercury control technology, including integrated gasification combined cycle (IGCC) technology. Additionally, no new coal-fired power plants should be permitted until rules to require cleaner coal-fired utilities are implemented. SEED commented that mercury controls and continuous emissions monitors should be required from startup for new coal-burning power plants.

The commission has made no changes in response to this comment. The commission is aware of recent pilot tests of several mercury control technologies for lignite-fired utility boilers. In comparison to other coals, however, the mercury content of lignite is typically higher and more variable. Also, the control technologies evaluated had lower mercury removal efficiencies with lignite than with other coals. The commission is not aware of any testing that has shown 90% or higher mercury removal efficiency with lignite. The commission also notes that market-based cap and trade systems provide flexibility in the manner companies comply with emission budgets, instead of specifying particular control technology requirements.

IGCC is a production process designed to generate electric energy and usable thermal energy, not a specific control technology designed to reduce emissions. The commission does not dictate the choice of production processes. The existing permitting process requires a Best Available Control Technology (BACT) review to ensure the use of control technologies that result in cleaner electric generation. The commission does not have the discretion to withhold the issuance of pending permits to require a level of control based on the determination of future BACT. The Texas Clean Air Act requires the commission to issue permits upon a finding that the applicant has met BACT requirements at the time of application. In addition to the emissions limitation imposed by the mercury emissions budget cap, standards of performance for mercury have been finalized in the CAMR.

The federal CAIR and CAMR as adopted by Texas require continuous emissions monitoring and controls that reduce mercury emissions for all new coal-fired utilities.

SEED, Public Citizen, TCE, Downwinders at Risk, WECAN, Environment Texas, APSR, DFW Sierra Club, and 48 individuals commented that by the year 2010 the proposed rules would allow an increase in mercury emissions from 2003 levels.

The commission has made no changes in response to this comment. According to the commission's 2003 Emissions Inventory, the reported mercury emissions from the 36 existing coal-fired EGUs equal 4.9376 tons. The Phase I mercury budget for Texas under CAMR is 4.657 tons. This equates to a decrease of 0.2806 tons annually. Phase I mercury emission reductions will result from implementation of the federal CAIR. The CAMR does not require the implementation of new mercury-specific controls until Phase II begins in 2018.

SEED, Public Citizen, TCE, Downwinders at Risk, WECAN, and Environment Texas commented that the economic analysis for the proposed rule is incomplete and does not address the cost to school districts or the economic impacts on bays, estuaries, and the fishing industry. SEED attached to its written comments a copy of the opinion in *Reilly v. U.S. EPA*, decided April 13, 2006, by the United States District Court in Massachusetts. SEED does not explain how the case supports its comments. SEED submitted information about studies critical of the EPA's economic analysis supporting the CAMR.

The commission has made no changes in response to these comments. Because the *Reilly v. U.S. EPA* opinion deals with a Freedom of Information Act request for modeling runs performed by EPA in the process of promulgating the CAMR, and because the opinion discusses the EPA's attempt to withhold modeling run information relating to cost studies relevant to CAMR, the commission interprets SEED's comment to relate to inadequacy of the information about cost studies presented by EPA as part of the CAMR. The EPA provided public notice and opportunity for comment during the promulgation of CAMR. The federal CAMR has been adopted as a final rule and concerns about its promulgation are outside the scope of this rulemaking.

Extensive economic analyses were conducted as part of the federal rulemaking process that resulted in the CAMR. (See the discussion in the proposed and adopted federal rules, links to which may be found at *http://www.epa.gov/air/mercuryrule/rule.htm*.) These analyses focused on benefits and costs of the implementation of the CAMR on the regulated industry, government, business, and the public. EPA also prepared an economic analysis of the final rule entitled "Regulatory Impact Analysis of the Final Clean Air Mercury Rule." Links to this document and to many others containing EPA's economic analyses may be found at *http://www.epa.gov/air/mercuryrule/index.html*.

The commission also conducted analyses of the costs and benefits of the implementation of the federal rule through its incorporation by reference in Chapter 101. The commission's fiscal analysis indicates that the primary near-term effect of the CAMR will be the benefits of reduced mercury emissions and greater protection of human health and the environment. Generally, both the EPA and state analyses so far have found no significant adverse effects of the CAMR with the exception of additional costs to utilities.

SEED, Public Citizen, TCE, Downwinders at Risk, WECAN, Environment Texas, and one individual commented that the commission has yet to complete its study on mercury, as required under HB 2481, and should do so prior to adopting any rules concerning mercury.

The rules have not been revised in response to this comment. According to the requirements of HB 2481, the commission must report the findings of the mercury study to the Texas Legislature by September 1, 2006. Given the abbreviated amount of time between the effective date of the federal rule and the deadline for the state to complete its rulemaking and state plan for implementation of the CAMR, the study could not be completed prior to proposal and adoption of the state rule incorporating the CAMR by reference. Staff are currently in the process of conducting the study and developing this report.

Seventy-four individuals commented that the announcement of the public hearings for the proposed rule should have been broadcast on local news stations to increase public awareness.

The commission has made no changes in response to this comment. The commission has complied with the requirements for public hearings and notification under 40 Code of Federal Regulations §51.102 and §60.23; Texas Government Code, Subchapter B, Chapter 2001; and under Texas Health and Safety Code, Texas Clean Air Act, §382.017. The commission strives to give all citizens of Texas appropriate prior notification and opportunity to comment, including the ability to submit written comments. Hearing notices for these rules were published in the following newspapers: *Austin American-Statesman*, March 9, 2006; *Corpus Christi Caller-Times*, March 8, 2006; *El Paso Times*, March 8, 2006; *Fort Worth Star-Telegram*, March 8, 2006; *Houston Chronicle*, March 8, 2006; and the *Midland Reporter-Telegram*, March 8, 2006. In addition, on March 9, 2006, a media release was posted to the TCEQ Web site and faxed to radio and television stations and daily and weekly newspapers in the Austin, Dallas-Fort Worth, and Houston markets. The release was also delivered on March 9 via the media relations listserve, to which anyone may subscribe. (See "email alerts" under News Releases on the TCEQ Web site.) The commission has no control over the conditions under which media choose to publish or broadcast the content of these releases.

Two individuals commented that the CAIR and CAMR do not comply with "the rule between the states." SEED commented that the promulgation of the CAIR and CAMR was not accomplished through a "just process." Environment Texas commented that the EPA illegally delisted power plants from the list of sources requiring maximum controls and illegally set up the cap and trade program.

The commission is unsure what is meant by the comment asserting that the federal rules do not comply with the rule between the states; however, the ultimate result of the implementation of CAIR and CAMR will be reductions in mercury emissions from coal-fired utilities nationwide. CAIR and CAMR underwent public notice and comment and have been adopted by the EPA as final rules. Challenges to or concerns about their promulgation are outside the scope of this rulemaking.

One individual commented that the commission should require monitoring of and regulate mercury from gas streams.

The rules have not been revised in response to this comment. The adopted rules are designed to implement the federal CAMR program which applies specifically to coal-fired EGUs. Monitoring of mercury emissions from these sources is a requirement under these rules. Requirements to monitor or regulate mercury emissions from gas processing facilities are outside the scope of

this rulemaking and would need to be addressed in a separate, future rulemaking.

Houston Sierra Club commented that the commission should calculate the specific mercury reduction for Texas based on the allocated Phase I and Phase II mercury budgets so that the public can easily understand its significance for the proposed rule.

Under the federal CAMR rule, Texas has been given an annual mercury budget of 4.657 tons for Phase I (2010 - 2017) and 1.838 tons for Phase II (2018 - and thereafter). Based on this budget, EPA predicted the mercury reductions associated with CAMR compliance. According to EPA's predictions, CAMR compliance in Texas will result in a mercury reduction of 7% or 0.4 tons by 2010 and a total of 63% or 3.2 tons by 2018. However, it is important to note that because Texas will be participating in the EPA-administered cap and trade program for CAMR, reductions could be higher if EGUs elect to over-control beyond their CAMR allocations or the reductions could be less if EGUs choose to purchase CAMR allowances to stay in compliance. Regardless of the number of new coal-fired EGUs in Texas, the state's mercury budget will not increase.

AECT recommended revising proposed §101.602(a) to remove the phrase "except as specified in this division" on the basis that the phrase is unnecessary and confusing since there is nothing specified elsewhere in the division that is contrary to the statement made in proposed §101.602(a).

The rule has been revised based on this comment to remove the phrase "except as specified in this division" from §101.602(a). The phrase is unnecessary because there is no language elsewhere in Division 8 that contradicts the language in §101.602(a).

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The new sections are also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.014, concerning Emission Inventory; §382.016, concerning Monitoring Requirements; House Bill 2481, §2, codified in THSC, §382.0173, concerning Adoption of Rules Regarding Certain SIP Requirements and Standards of Performance for Certain Sources; §382.054, concerning Federal Operating Permit; and FCAA, 42 USC, §§7401 *et seq*., which requires states to submit plans establishing standards of performance for existing sources of pollutants for which national ambient air quality standards have not been established, and providing for the implementation and enforcement of such standards of performance.

The adopted new sections implement THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, 382.0173, 382.054, and FCAA, 42 USC, §§7401 *et seq*.

§101.602. Clean Air Mercury Rule Trading Program.

(a) The commission adopts and incorporates by reference the provisions of 40 Code of Federal Regulations (CFR) Part 60, Subpart HHHH, Emission Guidelines and Compliance Times for Coal-Fired Electric Steam Generating Units, as adopted May 18, 2005 (70 FR 28606), for purposes of implementing the clean air mercury rule (CAMR) trading program for mercury to meet the requirements of Federal Clean Air Act, §111.

(b) Owners and operators of sources subject to 40 CFR Part 60, Subpart HHHH, shall comply with those requirements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 14, 2006.

TRD-200603762
Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: August 3, 2006
Proposal publication date: March 17, 2006
For further information, please call: (512) 239-5017

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CHAPTER 122. FEDERAL OPERATING PERMITS PROGRAM

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §§122.10, 122.12, 122.120, and 122.410 and also adopts new §§122.420, 122.422, 122.424, 122.426, 122.428, 122.440, 122.442, 122.444, 122.446, and 122.448.

Sections 122.10, 122.12, 122.120, 122.410, 122.420, 122.422, 122.424, 122.426, 122.428, and 122.444 are adopted *with changes* to the proposed text as published in the March 17, 2006, issue of the *Texas Register* (31 TexReg 1891). Sections 122.440, 122.442, 122.446, and 122.448 are adopted *without changes* and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

On May 12, 2005, the United States Environmental Protection Agency (EPA) published the Clean Air Interstate Rule (CAIR) to assist nonattainment areas in downwind states in achieving compliance with the national ambient air quality standards (NAAQS) for particulate matter less than or equal to 2.5 microns ($PM_{2.5}$) and eight-hour ozone. Twenty-eight eastern states and the District of Columbia were identified as upwind contributors to the nonattainment of the $PM_{2.5}$ and eight-hour ozone NAAQS, prompting the requirement for the reduction in emissions of sulfur dioxide (SO_2) and nitrogen oxides (NO_x). Twenty-three states, including Texas, and the District of Columbia were found to contribute to the downwind nonattainment of the $PM_{2.5}$ NAAQS and are required to make reductions in annual emissions of SO_2 and NO_x.

On May 18, 2005, EPA published the Clean Air Mercury Rule (CAMR) to permanently cap and reduce mercury emissions from new and existing coal-fired electric generating units (EGUs), nationwide. The mercury reduction requirements under CAMR will be implemented in two phases by providing states with declining budgets. Phase I begins in 2010 and continues through the year 2017. During those years, Texas will receive an annual mercury budget of 4.657 tons. The Phase II mercury budget will begin in

2018, and Texas will receive an annual budget of 1.838 tons that year and each year thereafter.

EPA provided states with two compliance options for meeting the reduction requirements under CAIR and CAMR: 1) meet the state's emission budgets by requiring EGUs to participate in an EPA- administered interstate cap and trade program; or 2) meet an individual state emissions budget through measures of the state's choosing. The 79th Legislature, 2005, enacted House Bill (HB) 2481, requiring Texas to participate in the EPA-administered interstate cap and trade program through the incorporation by reference of the CAIR and CAMR model trading rules. HB 2481 also provided specific direction for the methodology to be used in allocating the CAIR NO_x budget provided to Texas, identified an amount of CAIR NO_x allowances to be set aside for new sources, and specified that reductions associated with CAIR would only be required from new and existing EGUs and not from other sources of SO_2 and NO_x emissions.

The CAIR and CAMR model trading rules under federal regulations are market-based cap and trade systems designed to reduce the costs of complying with the new NO_x, SO_2, and mercury reduction requirements. The CAIR trading programs cap annual emissions of NO_x and SO_2 by providing each state in the named region with an annual emissions budget to be applied to all fossil fuel-fired boilers and turbines serving an electrical generator with a nameplate capacity greater than 25 megawatts of electricity (MWe) and producing electricity for sale. The CAMR trading program caps nationwide annual emissions of mercury by providing each state with an annual emissions budget to be applied to all coal-fired boilers and turbines serving an electrical generator with a nameplate capacity greater than 25 MWe and producing electricity for sale.

The commission is concurrently adopting an additional rulemaking to 30 TAC Chapter 101, General Air Quality Rules, in this issue of the *Texas Register* that will distribute the CAIR and CAMR trading budgets for Texas to each affected unit based on the specific direction provided under HB 2481. The commission is also adopting a CAIR state implementation plan (SIP) and CAMR state plan.

HB 2481 amended Texas Health and Safety Code (THSC), Chapter 382 by adding 382.0173. THSC, §382.0173(a) requires that the commission adopt rules "incorporat{ing} by reference 40 CFR Subparts AA through II and Subparts AAA through III of Part 96 and 40 CFR Subpart HHHH of Part 60." Additionally, THSC, §382.0173(b) requires the commission to "make permanent allocations that are reflective of the allocation requirements of 40 CFR Subparts AA through HH and Subparts AAA through HHH of Part 96 and 40 CFR Subpart HHHH of Part 60 . . . at no cost . . . using the {EPA's} allocation method as specified by Section 60.4142(a)(1)(i), as issued by that agency on May 12, 2005, or 40 CFR Section 96.142(a)(1)(i), as issued by that agency on May 18, 2005, as applicable with the exception of nitrogen oxides which shall be allocated according to the additional requirements of Subsection (c)." THSC, §382.0173(c) provides additional requirements regarding NO_x allocations, specifically a requirement to maintain a special reserve of allocations for certain units, and requirements relating to establishing allocations for specific control periods. THSC, §382.0173(d) provided that its provisions applied only while the federal rules were enforceable and that the provisions of HB 2481 do "not limit the authority of the commission to implement more stringent emissions control requirements."

The commission interprets these requirements together in order to provide effect to the expressed intent of the legislature. Specifically, the commission interprets the language of new THSC, §382.0173(d) as not restricting existing authority to require further emissions control requirements, but not to interfere with, or change, the requirements of the CAIR NO_x and SO_2, or the CAMR mercury emission trading programs. The legislature expressed clear intent that the commission implement the CAIR and CAMR emission trading programs by requiring the incorporation by reference of the CAIR and CAMR program rules as promulgated by EPA, and requiring the use of EPA-specified allocation methodology, with some exceptions for CAIR NO_x allowances.

Under the EPA model trading rules, each CAIR source and CAMR source must apply for and receive CAIR and CAMR permits as a separate part of the source's federal operating permit. These new and amended sections establish procedures and requirements for incorporating CAIR and CAMR permits into a source's federal operating permit.

CAIR permits may apply to NO_x, SO_2, or both. In rule language applicable to the issuance and administration of CAIR permits, the commission connects elements of the CAIR permit using the conjunction "and." The absence of one of the elements in individual permit circumstances does not affect the applicability of the rule to the remaining elements.

SECTION BY SECTION DISCUSSION

The commission adopts administrative changes throughout these sections to be consistent with *Texas Register* requirements and other agency rules and guidelines.

§122.10, General Definitions

The amendment adds CAIR and CAMR to the definition of "Applicable requirement."

The commission also deletes §122.10(21)(C) which contains references to 30 TAC Chapters 120, Control of Air Pollution from Hazardous Waste or Solid Waste Management Facilities and 121, Control of Air Pollution from Municipal Solid Waste Management Facilities. These two chapters had been previously repealed. The commission is also modifying the definition of "Major source" to use the term "nitrogen oxides" instead of "oxides of nitrogen" for consistency within this and other commission rules.

§122.12, Acid Rain, Clean Air Interstate Rule, and Clean Air Mercury Rule Definitions

The adopted amendment to this section adds definitions for "Clean Air Interstate Rule permit" and "Mercury budget permit" consistent with the federal definitions in 40 Code of Federal Regulations (CFR) §§60.4102; 96.102; and 96.202, Definitions. In both definitions, the permit is the legally binding and federally enforceable written document specifying annual trading program requirements applicable to the source and to the owner, operator, and designated representative of the source and each unit. The title of the section is amended to "Acid Rain, Clean Air Interstate Rule, and Clean Air Mercury Rule Definitions."

§122.120, Applicability

The amendment adds §122.120(a)(5) - (7) to expand the requirements of Chapter 122 to CAIR NO_x, CAIR SO_2, and mercury budget units required to have a federal operating permit. The commission is also modifying the section to use the term "nitrogen oxides" instead of "oxides of nitrogen" for consistency within this and other commission rules.

§122.410, Operating Permit Interface

This section previously contained language that incorporates by reference, 40 CFR Parts 72, 74, and 76. The amended section incorporates the most recent version of 40 CFR Parts 72, 74, and 76 and additionally incorporates 40 CFR Parts 73, 77, and 78. These federal regulations relate to the implementation of the Acid Rain Program and include the requirements for CAIR and CAMR. 40 CFR Part 78 was inadvertently left out during proposal and was included during adoption.

§122.420, General Clean Air Interstate Rule Annual Trading Program Permit Requirements

The new section establishes the basic requirements for a CAIR permit. A CAIR permit will include sources of NO_x and SO_2 that are required to have a federal operating permit. The CAIR permit will contain all applicable requirements of the annual trading programs and will be a separable part of the federal operating permit.

The new section also addresses the case of owners of units not required to have a federal operating permit that elect to opt-in to the CAIR program. In this case, the CAIR permit will become a part of the new source review permit.

The new section states that no CAIR permit will be issued until EPA has received a copy of the certificate of representation for the affected source. The certificate of representation identifies the CAIR source and requires the name, address, e-mail address, and phone number of the designated representative for the source. The certificate also identifies the owners and operators of the source. The designated representative is responsible for and must have the authority to carry out the duties of the CAIR trading programs. The commission is also modifying the section to use the term "nitrogen oxides" instead of "oxides of nitrogen" for consistency within this and other commission rules.

§122.422, Submission of Clean Air Interstate Rule Permit Applications

The new section requires the designated representative for any CAIR NO_x source and CAIR SO_2 source required to have a federal operating permit to submit a complete CAIR permit application for the source by June 1, 2007, or at least 18 months prior to the date when a new CAIR unit commences operation. The CAIR model rules require a complete CAIR permit application to be submitted to the permitting authority at least 18 months, or such lesser time provided by the permitting authority, prior to the start of the CAIR NO_x and SO_2 trading programs. Since the CAIR NO_x and SO_2 trading programs begin in 2009 and 2010, respectively, applicants would be required under EPA's model rule to submit separate permit applications for CAIR NO_x and CAIR SO_2 sources within one year of one another. The permit application submittal deadline of June 1, 2007, exercises the flexibility provided to states within the model rule to coordinate the permit deadlines for CAIR NO_x and SO_2 sources and requires the submittal of one permit application for both CAIR NO_x and CAIR SO_2 sources. The commission anticipates the coordination of the permit application submittal dates to be more efficient for both applicants and commission staff. The commission is also modifying the section to use the term "nitrogen oxides" instead of "oxides of nitrogen" for consistency within this and other commission rules.

The new section also requires a new application covering each CAIR source to be submitted by the designated representative in order to renew the CAIR permit.

§122.424, Information Requirements for Clean Air Interstate Rule Permit Applications

The new section establishes content requirements for CAIR applications. The application should identify each CAIR source and unit and will contain the information required under 40 CFR §96.106 and §96.206, Standard Requirements. These sections of the federal regulations address issues that include compliance accounts, allowance trading, and source monitoring. The new section requires a copy of the certificate of representation that is submitted to EPA, under §122.420, to be provided to the executive director. The commission is also modifying the section to use the term "nitrogen oxides" instead of "oxides of nitrogen" for consistency within this and other commission rules.

§122.426, Clean Air Interstate Rule Permit Contents and Term

The new section requires that each CAIR permit contain the same information required in CAIR permit applications under §122.424. Each CAIR permit incorporates the definitions in 40 CFR §96.102 and §96.202 and every allocation, transfer, or deduction of CAIR NO_x or CAIR SO_2 allowances. The term of the CAIR permit will be established by the executive director in order to coordinate the renewal of the CAIR permit with the issuance, revision, or renewal of the source's federal operating permit. The commission is also modifying the section to use the term "nitrogen oxides" instead of "oxides of nitrogen" for consistency within this and other commission rules.

§122.428, Clean Air Interstate Rule Permit Revisions

This new section authorizes the executive director to revise CAIR permits as necessary in accordance with the requirements of this chapter.

§122.440, General Mercury Budget Trading Program Permit Requirements

The new section establishes the basic requirements for a mercury budget permit. A mercury budget permit will be issued to sources with a mercury budget that are required to have a federal operating permit. The mercury budget permit will contain all applicable requirements of the annual trading program and will be a separable part of the federal operating permit.

The new section also states that no mercury budget permit will be issued until EPA has received a copy of the certificate of representation for the affected source. The certificate of representation identifies the mercury budget source and requires the name, address, e-mail address, and phone number of the designated representative for the source. The certificate also identifies the owners and operators of the source. The designated representative is responsible for and must have the authority to carry out the duties of the Mercury Budget Trading Program.

§122.442, Submission of Mercury Budget Permit Applications

The new section requires the designated representative for any mercury budget source required to have a federal operating permit to submit a complete mercury budget application for the source by June 1, 2007, or at least 18 months prior to when the new mercury budget source commences operation. The CAMR model rule requires a complete mercury budget permit application to be submitted to the permitting authority at least 18 months, or such lesser time provided by the permitting authority, prior to the start of the Mercury Budget Trading Program. Since the Mercury Budget Trading Program begins in 2010, applicants would be required under EPA's model rule to submit permit applications for mercury budget permits one year after submittal

of their application for a CAIR permit. The permit application submittal deadline of June 1, 2007, exercises the flexibility provided to states within the model rule to coordinate the permit deadlines for CAMR and CAIR and requires the submittal of one permit application for the mercury budget, CAIR NO_x, and CAIR SO_2 trading programs. The commission anticipates the coordination of the permit application submittal dates to be more efficient for both applicants and commission staff.

The new section also requires that a new application covering each mercury budget source be submitted by the designated representative in order to renew the mercury budget permit.

§122.444, Information Requirements for Mercury Budget Permit Applications

The new section establishes content requirements for mercury budget permit applications. The application must identify each mercury budget source and unit and will contain the information required under 40 CFR §60.4106, Standard Requirements, which addresses issues that include compliance accounts, allowance trading, and source monitoring. The new section requires that a copy of the certificate of representation submitted to EPA under §122.440 be provided to the executive director.

§122.446, Mercury Budget Permit Contents and Term

The new section requires that each mercury budget permit contain the same information required in mercury budget permit applications under §122.444. Each mercury budget permit will incorporate the definitions in 40 CFR §60.4102 and every allocation, transfer, and/or deduction of mercury allowances. The term of the mercury budget permit will be established by the executive director in order to coordinate the permit with the issuance, revision, or renewal of the source's federal operating permit.

§122.448, Mercury Budget Permit Revisions

This new section authorizes the executive director to revise mercury budget permits as necessary in accordance with the requirements of this chapter or other rules concerning permits.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking meets the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The rulemaking does not, however, meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The rulemaking is an incorporation by reference of changes relating to the federal Acid Rain Program in addition to requirements for federal operating permits to support CAIR and CAMR. CAIR includes EPA-administered emissions trading programs that will be governed by model rules provided in CAIR, which states may incorporate by reference. EPA found that Texas is among several states that contribute significantly to nonattainment of the NAAQS for $PM_{2.5}$ in downwind states. EPA is requiring these upwind states to revise their SIPs to include control measures to reduce emissions of SO_2 and NO_x, which are precursors to $PM_{2.5}$ formation. Reducing upwind precursor emissions will assist downwind $PM_{2.5}$ nonattainment areas to achieve the NAAQS in a more equitable, cost-effective manner than if those areas implemented local emissions reductions alone. EPA has specified the amount of each state's required reductions, but states have flexibility to choose the measures by which they achieve them. If states choose to control EGUs, then they must establish a budget or cap for those sources, which will be incorporated into the EGU federal operating permit. 42 United States Code (USC), §7411, creates a system for the establishment of standards of performance to reduce emissions from stationary sources. The CAMR establishes standards of performance for mercury emissions from new and existing coal-fired EGUs. 40 CFR Part 60, Subpart HHHH creates a trading program for EGUs that will provide a mechanism to meet the mercury standards by capping and then reducing emissions over time.

Specifically, the rulemaking incorporates by reference the provisions of 40 CFR Part 72 as published by EPA on May 12, 2005, with an effective date of July 1, 2006; 40 CFR Part 73 as published by EPA on May 12, 2005, with an effective date of July 1, 2006; 40 CFR Part 74 as published by EPA on May 12, 2005, with an effective date of July 1, 2006; 40 CFR Part 76 with an effective date of May 1, 1998, 40 CFR Part 77 as published by EPA on May 12, 2005, with an effective date of July 1, 2006, and 40 CFR Part 78 as published by EPA on May 12, 2005, with an effective date of July 11, 2005, for purposes of implementing an Acid Rain Program that meets the requirements of Federal Clean Air Act (FCAA), Title IV and supports CAIR and CAMR. Additionally, the rulemaking incorporates requirements for federal operating permits for sources subject to CAIR and CAMR. The rulemaking fulfills the requirements of HB 2481, enacted by the 79th Legislature, 2005, to incorporate CAIR and CAMR by reference, which includes requirements for federal operating permits for sources subject to CAIR and CAMR and compliance with the Acid Rain Program.

The incorporation of the federal rules is intended to protect the environment and to reduce risks to human health and safety from environmental exposure by supporting the reductions of NO_x and SO_2 emissions from upwind states so that downwind states may reach attainment of the NAAQS for $PM_{2.5}$ and by reducing emissions of mercury. CAIR includes revisions to the Acid Rain Program regulations under FCAA, Title IV, particularly the regulatory provisions governing the SO_2 cap and trade program. The revisions streamline the operation of the Acid Rain SO_2 cap and trade program and facilitate its interaction with the CAIR trading program. While the rulemaking is intended to protect human health and the environment, it may adversely affect in a material way sources in the state that fall under the applicability requirements in the federal rules. Cost and benefits of CAIR and CAMR were analyzed by EPA during the federal notice and comment rulemaking for CAIR and the CAMR. CAIR and CAMR are required federal programs, and the ability of states to modify their requirements is limited.

The rulemaking implements requirements of the FCAA. Under 42 USC, §7410(a)(2)(D), each SIP must contain adequate provisions prohibiting any source within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment of the NAAQS in any other state. While 42 USC, §7410, generally does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter" (42 USC, Chapter 85, Air Pollution Prevention and Control). Under 42 USC, §7411(b)(1)(A), EPA must establish a list of stationary source categories that it has determined "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 USC, §7411(b)(1)(B), then requires EPA to set national standards of performance for new sources within each listed source category. Standards of performance for existing sources of pollutants in the same source categories must then be issued. Under 42 USC, §7411(d), EPA is authorized to promulgate standards of performance that states must adopt through a SIP-like process, which requires state rulemaking action followed by review and approval by EPA under 40 CFR Part 60, Subpart B, Adoption and Submittal of State Plans for Designated Facilities. One of these requirements is that sources subject to CAIR and CAMR must make appropriate changes to their federal operating permits, and comply with changes to the Acid Rain Program.

The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410 and §7411. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule. While 42 USC, §7411, like 42 USC, §7410 (SIPs), does not require specific programs, in order to meet the standard, state plans must include "enforceable emission limitations" and other control measures (including economic incentives such as fees, marketable permits, and auctions of emissions rights). State plans must also include timetables for compliance "as may be necessary or appropriate to meet the applicable requirements of this chapter" (42 USC, Chapter 85). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet emission standards. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for meeting the standards. Thus, while specific measures are not generally required, the emission reductions of 42 USC, §7411 are required. States are not free to ignore the requirements of 42 USC, §7411, and must develop strategies to assure that the emission standards for new and existing sources are met. Adoption of the federal CAIR and CAMR and participation in their emissions cap and trade approach for NO_x, SO_2, and mercury emissions is the method the state has chosen to achieve those reductions in a flexible and cost-effective manner, and the rules relating to federal operating permits and compliance with the Acid Rain Program requirements are required elements of both CAIR and CAMR.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, and meet the requirements of 42 USC, §§7410 *et seq.*, the commission routinely proposes and adopts SIP rules and other federally required rules. The legislature is presumed to understand this federal process. If each rule proposed for inclusion in the SIP or otherwise federally required was considered to be a major environmental rule that exceeds federal law, then every rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP or otherwise federally required fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *(Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App.

Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978)).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of the rulemaking is to protect the environment and to reduce risks to human health by adoption of the federal revisions to the Acid Rain Program by reference, and to specify requirements for federal operating permits for sources subject to CAIR and CAMR. The rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this rulemaking. Finally, this rulemaking was not developed solely under the general powers of the agency, but is required by THSC, §382.0173. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because, although the rulemaking meets the definition of a "major environmental rule," it does not meet any of the four applicability criteria for a major environmental rule.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the rulemaking is an incorporation by reference of changes relating to the federal Acid Rain Program in addition to requirements for federal operating permits to support the federal CAIR and federal CAMR. The 79th Legislature enacted HB 2481, which created a requirement in THSC, TCAA, §382.0173, to adopt the federal CAIR and CAMR program rules by reference, which include requirements relating to the federal Acid Rain Program and federal operating permits. Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to this rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law and by state law.

In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this rulemaking action is exempt under Texas Government Code, §2007.003(b)(13). EPA promulgated CAIR to reduce NO_x and SO_2 emissions from upwind states so that downwind states may reach attainment of the NAAQS for $PM_{2.5}$. The rulemaking will enable Texas to implement the federal emissions budget and trading program and impose its requirements on new and existing fossil fuel-fired electric utility units, ultimately ensuring reductions of NO_x and SO_2 emissions. The rulemaking specifically targets a category of sources with significant NO_x and SO_2 emissions, and through the cap and trade program supports cost-effective control strategies. EPA also promulgated federal standards of performance for mercury emissions to reduce emissions of mercury. The rulemaking will enable Texas to implement, through the federal operating permit program, the federal cap and trade program and impose its requirements on new and existing coal-fired electric utility units, ultimately ensuring reductions of mercury emissions into the environment. The rulemaking action will specifically advance the health and safety purpose by reducing mercury levels through an emissions cap and gradual reductions in emissions. The rulemaking specifically targets a category of sources with significant mercury emissions, and through the cap and trade program supports cost-effective control strategies.

Consequently, the rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4) and (13). For these reasons, Texas Government Code, Chapter 2007 does not apply to this rulemaking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq*.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), concerning Actions and Rules Subject to the Coastal Management Program, the commission's rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). No new sources of air contaminants will be authorized and the revisions will maintain at least the same level of emissions control as the existing rules. The CMP policy applicable to this rulemaking action is the policy that the commission's rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.32). This rulemaking action complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans and 40 CFR Part 60, Subpart B, Adoption and Submittal of State Plans for Designated Facilities. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The new and amended sections in this adoption are applicable requirements under Chapter 122. Upon the effective date of this rulemaking, owners or operators subject to the Federal Operating Permit Program will be subject to the amended requirements of these sections.

PUBLIC COMMENT

Public hearings for this rulemaking were conducted in Austin on April 11, 2006; in Fort Worth on April 12, 2006; and in Houston on April 13, 2006.

American Wind Energy Association (AWEA), Association of Electric Companies of Texas, Inc. (AECT), Blue Skies Alliance (Blue Skies), Dennis Bonnen, House of Representatives

(Bonnen), Calpine Corporation (Calpine), Entergy Services, Inc. (Entergy), FPL Group (FPL), Gulf Coast Lignite Coalition (GCLC), Lone Star Chapter of the Sierra Club (Sierra Club), NRG Texas LP (NRG), Public Citizen, Southwestern Public Service Company (SPS), The Sustainable Energy and Economic Development Coalition (SEED), Texas Mining and Reclamation Association (TMRA), TXU Power (TXU), EPA, and 113 individuals commented during the public comment period. Only those comments concerning issues in Chapter 122 will be addressed in this preamble; the other comments will be addressed in the concurrently adopted amendments to Chapter 101 and SIP narrative.

RESPONSE TO COMMENTS

EPA commented that its revisions to the Acid Rain Program in 40 CFR Parts 72 - 74 made in 2006 should be incorporated in order for the Acid Rain Program to interact with CAIR. EPA suggested changing the preamble discussion for the Chapter 122 rules and the regulatory language for §122.410 to incorporate 40 CFR Part 78.

The commission is adopting by reference 40 CFR Parts 72 - 74 as published in the CAIR final rule on May 12, 2005, with an effective date of July 1, 2006. The commission will consider the incorporation of subsequent amendments to these sections of the federal rules in future rulemaking and SIP revision actions. The commission agrees that 40 CFR Part 78 should be incorporated by reference. This part was mistakenly omitted at proposal of this rule, and the commission has added the appropriate citation in §122.410. The commission is also including reference to 40 CFR Part 78 in the preamble.

EPA stated that the preamble should clarify why §122.10(21)(C) was deleted.

The commission is deleting §122.10(21)(C) because the rule chapters cited in the subparagraph had been repealed in previous rule actions.

SUBCHAPTER A. DEFINITIONS

30 TAC §122.10, §122.12

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendments are also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; HB 2481, §2 of the 79th Legislature, codified at §382.0173, concerning adoption of rules regarding certain SIP requirements and standards of performance for certain sources; and §382.054, concerning federal operating permits; and FCAA, 42 USC, §§7401 *et seq*., which require states to include in their SIPs adequate provisions prohibiting any source within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment, or interfere with maintenance of the NAAQS in any other state.

The adopted amendments implement THSC, §§382.002, 382.011, 382.012, HB 2481, §2 of the 79th Legislature, codified at §382.0173, and §382.054; and FCAA, 42 USC, §§7401 *et seq*.

§122.10. General Definitions.

The definitions in the Texas Clean Air Act, Chapter 101 of this title (relating to General Air Quality Rules), and Chapter 3 of this title (relating to Definitions) apply to this chapter. In addition, the following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Air pollutant--Any of the following regulated air pollutants:

(A) nitrogen oxides;

(B) volatile organic compounds;

(C) any pollutant for which a national ambient air quality standard has been promulgated;

(D) any pollutant that is subject to any standard promulgated under Federal Clean Air Act (FCAA), §111 (Standards of Performance for New Stationary Sources);

(E) unless otherwise specified by the United States Environmental Protection Agency (EPA) by rule, any Class I or II substance subject to a standard promulgated under or established by FCAA, Title VI (Stratospheric Ozone Protection); or

(F) any pollutant subject to a standard promulgated under FCAA, §112 (Hazardous Air Pollutants) or other requirements established under §112, including §112(g), (j), and (r), including any of the following:

(i) any pollutant subject to requirements under FCAA, §112(j). If the EPA fails to promulgate a standard by the date established under FCAA, §112(e), any pollutant for which a subject site would be major shall be considered to be regulated on the date 18 months after the applicable date established under FCAA, §112(e); and

(ii) any pollutant for which the requirements of FCAA, §112(g)(2) have been met, but only with respect to the individual site subject to FCAA, §112(g)(2) requirement.

(2) Applicable requirement--All of the following requirements, including requirements that have been promulgated or approved by the United States Environmental Protection Agency (EPA) through rulemaking at the time of issuance but have future-effective compliance dates:

(A) all of the requirements of Chapter 111 of this title (relating to Control of Air Pollution From Visible Emissions and Particulate Matter) as they apply to the emission units at a site;

(B) all of the requirements of Chapter 112 of this title (relating to Control of Air Pollution from Sulfur Compounds) as they apply to the emission units at a site;

(C) all of the requirements of Chapter 113 of this title (relating to Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants), as they apply to the emission units at a site;

(D) all of the requirements of Chapter 115 of this title (relating to Control of Air Pollution from Volatile Organic Compounds) as they apply to the emission units at a site;

(E) all of the requirements of Chapter 117 of this title (relating to Control of Air Pollution From Nitrogen Compounds) as they apply to the emission units at a site;

(F) the following requirements of Chapter 101 of this title (relating to General Air Quality Rules):

(i) Chapter 101, Subchapter A of this title (relating to General Rules), §101.1 of this title (relating to Definitions), insofar as the terms defined in this section are used to define the terms used in other applicable requirements;

(ii) Chapter 101, Subchapter A, §101.3 and §101.10 of this title (relating to Circumvention; and Emissions Inventory Requirements);

(iii) Chapter 101, Subchapter A, §101.8 and §101.9 of this title (relating to Sampling; and Sampling Reports) if the commission or the executive director has requested such action;

(iv) Chapter 101, Subchapter F of this title (relating to Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities), §§101.201, 101.211, 101.221, 101.222, and 101.223 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements; Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements; Operational Requirements; Demonstrations; and Actions to Reduce Excessive Emissions); and

(v) Chapter 101, Subchapter H of this title (relating to Emissions Banking and Trading) as it applies to the emission units at a site;

(G) any site-specific requirement of the state implementation plan;

(H) all of the requirements under Chapter 106, Subchapter A of this title (relating to Permits by Rule), or Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) and any term or condition of any preconstruction permit;

(I) all of the following federal requirements as they apply to the emission units at a site:

(i) any standard or other requirement under Federal Clean Air Act (FCAA), §111 (Standards of Performance for New Stationary Sources);

(ii) any standard or other requirement under FCAA, §112 (Hazardous Air Pollutants);

(iii) any standard or other requirement of the Acid Rain, Clean Air Interstate Rule, or Clean Air Mercury Rule Programs;

(iv) any requirements established under FCAA, §504(b) or §114(a)(3) (Monitoring and Analysis or Inspections, Monitoring, and Entry);

(v) any standard or other requirement governing solid waste incineration under FCAA, §129 (Solid Waste Combustion);

(vi) any standard or other requirement for consumer and commercial products under FCAA, §183(e) (Federal Ozone Measures);

(vii) any standard or other requirement under FCAA, §183(f) (Tank Vessel Standards);

(viii) any standard or other requirement under FCAA, §328 (Air Pollution from Outer Continental Shelf Activities);

(ix) any standard or other requirement under FCAA, Title VI (Stratospheric Ozone Protection), unless EPA has determined that the requirement need not be contained in a permit; and

(x) any increment or visibility requirement under FCAA, Title I, Part C or any national ambient air quality standard, but only as it would apply to temporary sources permitted under FCAA, §504(e) (Temporary Sources); and

(J) the following are not applicable requirements under this chapter, except as noted in subparagraph (I)(x) of this paragraph:

(i) any state or federal ambient air quality standard;

(ii) any net ground level concentration limit;

(iii) any ambient atmospheric concentration limit;

(iv) any requirement for mobile sources;

(v) any asbestos demolition or renovation requirement under 40 Code of Federal Regulations (CFR) Part 61, Subpart M (National Emissions Standards for Asbestos);

(vi) any requirement under 40 CFR Part 60, Subpart AAA (Standards of Performance for New Residential Wood Heaters); and

(vii) any state only requirement (including §111.131 of this title (relating to Definitions), §111.133 of this title (relating to Testing Requirements), §111.135 of this title (relating to Control Requirements for Surfaces with Coatings Containing Lead), §111.137 of this title (relating to Control Requirements for Surface Coatings containing less than 1.0% Lead), and §111.139 of this title (relating to Exemptions).

(3) Continuous compliance determination method--For purposes of Subchapter G of this chapter (relating to Periodic Monitoring and Compliance Assurance Monitoring), a method, specified by an applicable requirement, which satisfies the following criteria:

(A) the method is used to determine compliance with an emission limitation or standard on a continuous basis consistent with the averaging period established for the emission limitation or standard; and

(B) the method provides data either in units of the emission limitation or standard or correlated directly with the emission limitation or standard.

(4) Control device--For the purposes of compliance assurance monitoring applicability, specified in §122.604 of this title (relating to Compliance Assurance Monitoring Applicability), the control device definition specified in 40 Code of Federal Regulations Part 64, concerning Compliance Assurance Monitoring, applies.

(5) Deviation--Any indication of noncompliance with a term or condition of the permit as found using compliance method data from monitoring, recordkeeping, reporting, or testing required by the permit and any other credible evidence or information.

(6) Deviation limit--A designated value(s) or condition(s) which establishes the boundary for an indicator of performance. Operation outside of the boundary of the indicator of performance shall be considered a deviation.

(7) Draft permit--The version of a permit available for the 30-day comment period under public announcement or public notice and affected state review. The draft permit may be the same document as the proposed permit.

(8) Emission unit--A discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a point of origin of air pollutants, including appurtenances.

(A) A point of origin of fugitive emissions from individual pieces of equipment, e.g., valves, flanges, pumps, and compressors, shall not be considered an individual emission unit. The fugitive emissions shall be collectively considered as an emission unit based on their relationship to the associated process.

(B) The term may also be used in this chapter to refer to a group of similar emission units.

(C) This term is not meant to alter or affect the definition of the term "unit" for purposes of the Acid Rain Program.

(9) Federal Clean Air Act, §502(b)(10) changes--Changes that contravene an express permit term. Such changes do not include changes that would violate applicable requirements or contravene federally enforceable permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements.

(10) Final action--Issuance or denial of the permit by the executive director.

(11) General operating permit--A permit issued under Subchapter F of this chapter (relating to General Operating Permits), under which multiple similar stationary sources may be authorized to operate.

(12) Large pollutant-specific emission unit--An emission unit with the potential to emit, taking into account control devices, the applicable air pollutant in an amount equal to or greater than 100% of the amount, in tons per year, required for a source to be classified as a major source, as defined in this section.

(13) Major source--

(A) For pollutants other than radionuclides, any site that emits or has the potential to emit, in the aggregate the following quantities:

(i) ten tons per year (tpy) or more of any single hazardous air pollutant listed under Federal Clean Air Act (FCAA), §112(b) (Hazardous Air Pollutants);

(ii) 25 tpy or more of any combination of hazardous air pollutant listed under FCAA, §112(b); or

(iii) any quantity less than those identified in clause (i) or (ii) of this subparagraph established by the United States Environmental Protection Agency (EPA) through rulemaking.

(B) For radionuclides regulated under FCAA, §112, the term "major source" has the meaning specified by the EPA by rule.

(C) Any site which directly emits or has the potential to emit, 100 tpy or more of any air pollutant. The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source, unless the stationary source belongs to one of the following categories of stationary sources:

(i) coal cleaning plants (with thermal dryers);

(ii) kraft pulp mills;

(iii) portland cement plants;

(iv) primary zinc smelters;

(v) iron and steel mills;

(vi) primary aluminum ore reduction plants;

(vii) primary copper smelters;

(viii) municipal incinerators capable of charging more than 250 tons of refuse per day;

(ix) hydrofluoric, sulfuric, or nitric acid plants;

(x) petroleum refineries;

(xi) lime plants;

(xii) phosphate rock processing plants;

(xiii) coke oven batteries;

(xiv) sulfur recovery plants;

(xv) carbon black plants (furnace process);

(xvi) primary lead smelters;

(xvii) fuel conversion plant;

(xviii) sintering plants;

(xix) secondary metal production plants;

(xx) chemical process plants;

(xxi) fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units (Btu) per hour heat input;

(xxii) petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(xxiii) taconite ore processing plants;

(xxiv) glass fiber processing plants;

(xxv) charcoal production plants;

(xxvi) fossil fuel-fired steam electric plants of more than 250 million Btu per hour heat input; or

(xxvii) any stationary source category regulated under FCAA, §111 (Standards of Performance for New Stationary Sources) or §112 for which the EPA has made an affirmative determination under FCAA, §302(j) (Definitions).

(D) Any site, except those exempted under FCAA, §182(f) (NO_x Requirements), which, in whole or in part, is a major source under FCAA, Title I, Part D (Plan Requirements for Nonattainment Areas), including the following:

(i) any site with the potential to emit 100 tpy or more of volatile organic compounds (VOC) or nitrogen oxides (NO_x) in any ozone nonattainment area classified as "marginal or moderate";

(ii) any site with the potential to emit 50 tpy or more of VOC or NO_x in any ozone nonattainment area classified as "serious";

(iii) any site with the potential to emit 25 tpy or more of VOC or NO_x in any ozone nonattainment area classified as "severe";

(iv) any site with the potential to emit ten tpy or more of VOC or NO_x in any ozone nonattainment area classified as "extreme";

(v) any site with the potential to emit 100 tpy or more of carbon monoxide (CO) in any CO nonattainment area classified as "moderate";

(vi) any site with the potential to emit 50 tpy or more of CO in any CO nonattainment area classified as "serious";

(vii) any site with the potential to emit 100 tpy or more of inhalable particulate matter (PM-10) in any PM-10 nonattainment area classified as "moderate";

(viii) any site with the potential to emit 70 tpy or more of PM-10 in any PM-10 nonattainment area classified as "serious"; and

(ix) any site with the potential to emit 100 tpy or more of lead in any lead nonattainment area.

(E) The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source under subparagraph (D) of this paragraph, unless the stationary source belongs to one of the categories of stationary sources listed in subparagraph (C) of this paragraph.

(F) Any temporary source which is located at a site for less than six months shall not affect the determination of a major source for other stationary sources at a site under this chapter or require a revision to the existing permit at the site.

(G) Emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not the units are in a contiguous area or under common control, to determine whether the units or stations are major sources under subparagraph (A) of this paragraph.

(14) Notice and comment hearing--Any hearing held under this chapter. Hearings held under this chapter are for the purpose of receiving oral and written comments regarding draft permits.

(15) Permit or federal operating permit--

(A) any permit, or group of permits covering a site, that is issued, renewed, or revised under this chapter; or

(B) any general operating permit issued, renewed, or revised by the executive director under this chapter.

(16) Permit anniversary--The date that occurs every 12 months after the initial permit issuance, the initial granting of the authorization to operate, or renewal.

(17) Permit application--An application for an initial permit, permit revision, permit renewal, permit reopening, general operating permit, or any other similar application as may be required.

(18) Permit holder--A person who has been issued a permit or granted the authority by the executive director to operate under a general operating permit.

(19) Permit revision--Any administrative permit revision, minor permit revision, or significant permit revision that meets the related requirements of this chapter.

(20) Potential to emit--The maximum capacity of a stationary source to emit any air pollutant under its physical and operational design or configuration. Any certified registration established under §106.6 of this title (relating to Registration of Emissions), §116.611 of this title (relating to Registration to Use a Standard Permit), or §122.122 of this title (relating to Potential to Emit), or a permit by rule under Chapter 106 of this title (relating to Permits by Rule) or other new source review permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) restricting emissions or any physical or operational limitation on the capacity of a stationary source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is enforceable by the United States Environmental Protection Agency. This term does not alter or affect the use of this term for any other purposes under the Federal Clean Air Act (FCAA), or the term "capacity factor" as used in Acid Rain provisions of the FCAA or the Acid Rain rules.

(21) Preconstruction authorization--Any authorization to construct or modify an existing facility or facilities under Chapter 106 and Chapter 116 of this title (relating to Permits by Rule; and Control of Air Pollution by Permits for New Construction or Modification). In this chapter, references to preconstruction authorization will also include the following:

(A) any requirement established under Federal Clean Air Act (FCAA) , §112(g) (Modifications); and

(B) any requirement established under FCAA, §112(j) (Equivalent Emission Limitation by Permit).

(22) Predictive emission monitoring system--A system that uses process and other parameters as inputs to a computer program or other data reduction system to produce values in terms of the applicable emission limitation or standard.

(23) Proposed permit--The version of a permit that the executive director forwards to the United States Environmental Protection Agency for a 45-day review period. The proposed permit may be the same document as the draft permit.

(24) Provisional terms and conditions--Temporary terms and conditions, established by the permit holder for an emission unit affected by a change at a site, or the promulgation or adoption of an applicable requirement or state-only requirement, under which the permit holder is authorized to operate prior to a revision or renewal of a permit or prior to the granting of a new authorization to operate.

(A) Provisional terms and conditions will only apply to changes not requiring prior approval by the executive director.

(B) Provisional terms and conditions shall not authorize the violation of any applicable requirement or state-only requirement.

(C) Provisional terms and conditions shall be consistent with and accurately incorporate the applicable requirements and state-only requirements.

(D) Provisional terms and conditions for applicable requirements and state-only requirements shall include the following:

(i) the specific regulatory citations in each applicable requirement or state-only requirement identifying the emission limitations and standards;

(ii) the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards identified under clause (i) of this subparagraph; and

(iii) where applicable, the specific regulatory citations identifying any requirements that no longer apply.

(25) Renewal--The process by which a permit or an authorization to operate under a general operating permit is renewed at the end of its term under §§122.241, 122.501, or 122.505 of this title (relating to Permit Renewals; General Operating Permits; or Renewal of the Authorization to Operate Under a General Operating Permit).

(26) Reopening--The process by which a permit is reopened for cause and terminated or revised under §122.231 of this title (relating to Permit Reopenings).

(27) Site--The total of all stationary sources located on one or more contiguous or adjacent properties, which are under common control of the same person (or persons under common control). A research and development operation and a collocated manufacturing facility shall be considered a single site if they each have the same two-digit Major Group Standard Industrial Classification (SIC) code (as described in the *Standard Industrial Classification Manual*, 1987)

or the research and development operation is a support facility for the manufacturing facility.

(28) State-only requirement--Any requirement governing the emission of air pollutants from stationary sources that may be codified in the permit at the discretion of the executive director. State-only requirements shall not include any requirement required under the Federal Clean Air Act or under any applicable requirement.

(29) Stationary source--Any building, structure, facility, or installation that emits or may emit any air pollutant. Nonroad engines, as defined in 40 Code of Federal Regulations Part 89 (Control of Emissions from New and In-use Nonroad Engines), shall not be considered stationary sources for the purposes of this chapter.

§122.12. Acid Rain, Clean Air Interstate Rule, and Clean Air Mercury Rule Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Acid Rain permit--The legally binding and segregable portion of the federal operating permit issued under this chapter, including any permit revisions, specifying the Acid Rain Program requirements applicable to an affected source, to each affected unit at an affected source, and to the owners and operators and the designated representative of the affected source or the affected unit.

(2) Acid Rain Program--The national sulfur dioxide and nitrogen oxides air pollution control and emissions reduction program established in accordance with Federal Clean Air Act , Title IV, contained in 40 Code of Federal Regulations Parts 72 - 78.

(3) Clean Air Interstate Rule permit--The legally binding and federally enforceable written document, or portion of such document, issued by the permitting authority under 40 Code of Federal Regulations Part 96, Subpart CC or Subpart CCC, including any permit revisions, specifying the Clean Air Interstate Rule (CAIR) Nitrogen Oxides (NO_x) Annual Trading Program and CAIR Sulfur Dioxide (SO_2) Trading Program requirements applicable to a CAIR NO_x source and CAIR SO_2 source, to each CAIR NO_x unit and CAIR SO_2 unit at the source, and to the owners and operators and the CAIR designated representative of the source and each such unit.

(4) Designated representative--The responsible individual authorized by the owners and operators of an affected source and of all affected units at the site, as evidenced by a certificate of representation submitted in accordance with the Acid Rain Program, to represent and legally bind each owner and operator, as a matter of federal law, in matters pertaining to the Acid Rain Program. Such matters include, but are not limited to: the holdings, transfers, or dispositions of allowances allocated to a unit; and the submission of or compliance with Acid Rain permits, permit applications, compliance plans, emission monitoring plans, continuous emissions monitor (CEM), and continuous opacity monitor (COM) certification notifications, CEM and COM certification and applications, quarterly monitoring and emission reports, and annual compliance certifications. Whenever the term "responsible official" is used in this chapter, it shall refer to the "designated representative" with regard to all matters under the Acid Rain Program.

(5) Mercury budget permit--The legally binding and federally enforceable written document, or portion of such document, issued by the permitting authority under 40 Code of Federal Regulations §§60.4120 - 60.4124, including any permit revisions, specifying the Mercury Budget Trading Program requirements applicable to a mercury budget source, to each mercury budget unit at the source, and to the owners and operators and the mercury designated representative of the source and each such unit.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Robert Martinez
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SUBCHAPTER B. PERMIT REQUIREMENTS
DIVISION 1. GENERAL REQUIREMENTS

30 TAC §122.120

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; HB 2481, §2 of the 79th Legislature, codified at §382.0173, concerning adoption of rules regarding certain SIP requirements and standards of performance for certain sources; and §382.054, concerning federal operating permits; and FCAA, 42 USC, §§7401 *et seq.*, which require states to include in their SIPs adequate provisions prohibiting any source within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment, or interfere with maintenance of, the NAAQS in any other state.

The adopted amendment implements THSC, §§382.002, 382.011, 382.012, HB 2481, §2 of the 79th Legislature, codified at §382.0173, and §382.054; and FCAA, 42 USC, §§7401 *et seq*.

§122.120. Applicability.

(a) Except as identified in subsection (b) of this section, owners and operators of one or more of the following are subject to the requirements of this chapter:

(1) any site that is a major source as defined in §122.10 of this title (relating to General Definitions);

(2) any site with an affected unit as defined in 40 Code of Federal Regulations Part 72 subject to the requirements of the Acid Rain Program;

(3) any solid waste incineration unit required to obtain a permit under Federal Clean Air Act (FCAA), §129(e) (relating to Solid Waste Combustion);

(4) any site that is a non-major source which the United States Environmental Protection Agency (EPA), through rulemaking, has designated as no longer exempt or no longer eligible for a deferral from the obligation to obtain a permit. For the purposes of this chapter, those sources may be any of the following:

(A) any non-major source so designated by the EPA, and subject to a standard, limitation, or other requirement under FCAA, §111 (relating to Standards of Performance for New Stationary Sources);

(B) any non-major source so designated by the EPA, and subject to a standard or other requirement under FCAA, §112 (relating to Hazardous Air Pollutants), except for FCAA, §112(r) (relating to Prevention of Accidental Releases); or

(C) any non-major source in a source category designated by the EPA;

(5) any Clean Air Interstate Rule (CAIR) nitrogen oxides unit, as defined in 40 CFR §96.102, Definitions, if the CAIR nitrogen oxides unit is otherwise required to have a federal operating permit;

(6) any CAIR sulfur dioxide unit, as defined in 40 CFR §96.202, Definitions, if the CAIR sulfur dioxide unit is otherwise required to have a federal operating permit; or

(7) any mercury budget unit, as defined in 40 CFR §60.4102, if the mercury budget unit is otherwise required to have a federal operating permit.

(b) The following are not subject to the requirements of this chapter:

(1) any site that is a non-major source which the EPA, through rulemaking, has designated as exempt from the obligation to obtain a permit; or

(2) any site that is a non-major source which the EPA has allowed permitting authorities to defer from the obligation to obtain a permit.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. ACID RAIN PERMITS, CLEAN AIR INTERSTATE RULE, CLEAN AIR MERCURY RULE

DIVISION 1. ACID RAIN PERMITS

30 TAC §122.410

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; HB 2481, §2 of the 79th Legislature, codified at §382.0173, concerning adoption of rules regarding certain SIP requirements and standards of performance for certain sources; and §382.054, concerning federal operating permits; and FCAA, 42 USC, §§7401 *et seq.*, which require states to include in their SIPs adequate provisions prohibiting any source within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment, or interfere with maintenance of, the NAAQS in any other state.

The adopted amendment implements THSC, §§382.002, 382.011, 382.012, HB 2481, §2 of the 79th Legislature, codified at §382.0173, and §382.054; and FCAA, 42 USC, §§7401 *et seq*.

§122.410. Operating Permit Interface.

(a) The commission hereby adopts and incorporates by reference, except as specified in this section, the provisions of 40 Code of Federal Regulations (CFR) Part 72 with an effective date of July 1, 2006; 40 CFR Part 73 with an effective date of July 1, 2006; 40 CFR Part 74 with an effective date of July 1, 2006, Part 76 with an effective date of May 1, 1998; 40 CFR Part 77 with an effective date of July 1, 2006; and 40 CFR Part 78 with an effective date of July 11, 2005, for purposes of implementing an Acid Rain Program that meets the requirements of Federal Clean Air Act, Title IV.

(b) Applicants for sources subject to 40 CFR Parts 72 - 74, 76, and 77 shall comply with those requirements.

(c) If the provisions of 40 CFR Parts 72 - 74, 76, and 77 conflict with or are not included in this chapter, the provisions of 40 CFR Parts 72 - 74, 76, and 77 shall apply and take precedence except for the following.

(1) References to 40 CFR Part 70 in 40 CFR Parts 72 - 74, 76, and 77 shall be satisfied by the requirements of this chapter for the purposes of implementing the Acid Rain Program.

(2) The procedural requirements for Acid Rain permit revisions in 40 CFR Part 72, Subpart H (Acid Rain Permit Revisions) shall be satisfied by §122.414 of this title (relating to Acid Rain Permit Revisions).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Acting Director, Environmental Law Division
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DIVISION 2. CLEAN AIR INTERSTATE RULE

30 TAC §§122.420, 122.422, 122.424, 122.426, 122.428

STATUTORY AUTHORITY

The new sections are adopted under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The new sections are also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; HB 2481, §2 of the 79th Legislature, codified at §382.0173, concerning adoption of rules regarding certain SIP requirements and standards of performance for certain sources; and §382.054, concerning federal operating permits; and FCAA, 42 USC, §§7401 *et seq*., which require states to include in their SIPs adequate provisions prohibiting any source within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment, or interfere with maintenance of, the NAAQS in any other state.

The adopted new sections implement THSC, §§382.002, 382.011, 382.012, HB 2481, §2 of the 79th Legislature, codified at §382.0173, and §382.054; and FCAA, 42 USC, §§7401 *et seq*.

§122.420. General Clean Air Interstate Rule Annual Trading Program Permit Requirements.

(a) For each Clean Air Interstate Rule (CAIR) nitrogen oxides (NO_x) source and CAIR sulfur dioxide (SO_2) source required to have a federal operating permit, such permit must include a CAIR permit. The CAIR portion of the federal permit must be administered in accordance with this chapter as applicable, except as provided otherwise by 40 Code of Federal Regulations (CFR) Part 96, Subpart CC and Subpart CCC.

(b) Each CAIR permit must contain, with regard to the CAIR NO_x source and CAIR SO_2 source and the CAIR NO_x units and CAIR SO_2 units at the source covered by the CAIR permit, all applicable CAIR NO_x Annual Trading Program, and CAIR SO_2 Trading Program requirements and must be a complete and separable portion of the federal operating permit or other federally enforceable permit under subsection (c) of this section.

(c) For each CAIR NO_x opt-in unit and CAIR SO_2 opt-in unit that is required to have a federally enforceable permit, such permit must include a CAIR permit. The CAIR portion of the federally enforceable permit must be administered in accordance with the commission's regulations for such permit as applicable, except as otherwise provided under 40 CFR Part 96, Subparts II and III.

(d) No CAIR permit may be issued, amended, reopened, or renewed until the United States Environmental Protection Agency has received a complete certificate of representation under 40 CFR §96.113 or §96.213 for a CAIR designated representative of the CAIR NO_x and CAIR SO_2 source and the CAIR NO_x and CAIR SO_2 units at the source.

§122.422. Submission of Clean Air Interstate Rule Permit Applications.

(a) The Clean Air Interstate Rule (CAIR) designated representative of any CAIR nitrogen oxides (NO_x) source and CAIR sulfur dioxide (SO_2) source required to have a federal operating permit shall submit to the executive director a complete CAIR permit application under §122.424 of this title (relating to Information Requirements for Clean Air Interstate Rule Permit Applications) for the source covering each CAIR NO_x unit and CAIR SO_2 unit at the source by June 1, 2007, or at least 18 months prior to the date that the CAIR NO_x unit and CAIR SO_2 unit commences operation.

(b) For a CAIR NO_x source and CAIR SO_2 source required to have a federal operating permit, the CAIR designated representative shall submit a complete CAIR permit application to the executive director under §122.424 of this title for the source covering each CAIR NO_x unit and CAIR SO_2 unit at the source to renew the CAIR permit in accordance with this chapter.

§122.424. Information Requirements for Clean Air Interstate Rule Permit Applications.

A complete Clean Air Interstate Rule (CAIR) permit application must include the following elements concerning the CAIR nitrogen oxides (NO_x) source and CAIR sulfur dioxide (SO_2) source for which the application is submitted, in a format prescribed by the executive director:

(1) identification of the CAIR NO_x source and CAIR SO_2 source;

(2) identification of each CAIR NO_x unit and CAIR SO_2 unit at the CAIR NO_x source and CAIR SO_2 source;

(3) the standard requirements under 40 Code of Federal Regulations §96.106 and §96.206;

(4) a copy of the complete certificate of representation submitted to the United States Environmental Protection Agency as required under §122.420(d) of this title (relating to General Clean Air Interstate Rule Annual Trading Program Permit Requirements); and

(5) any other information requested by the executive director.

§122.426. Clean Air Interstate Rule Permit Contents and Term.

(a) Each Clean Air Interstate Rule (CAIR) permit must contain, in a format prescribed by the executive director, all elements required for a complete CAIR permit application under §122.424 of this title (relating to Information Requirements for Clean Air Interstate Rule Permit Applications).

(b) Each CAIR permit must incorporate the definitions of terms under 40 Code of Federal Regulations §96.102 and §96.202 and, upon recordation by the United States Environmental Protection Agency administrator under 40 Code of Federal Regulations Part 96, Subparts FF, GG, II, FFF, GGG, and III every allocation, transfer, and deduction of a CAIR nitrogen oxides (NO_x) allowance and CAIR sulfur dioxide (SO_2) allowance to or from the compliance account of the CAIR NO_x source and CAIR SO_2 source covered by the permit.

(c) The executive director shall set the term of the CAIR permit as necessary to facilitate coordination of the renewal of the CAIR permit with issuance, revision, reopening, or renewal of the CAIR NO_x source's and CAIR SO_2 source's federal operating permit.

§122.428. Clean Air Interstate Rule Permit Revisions.

Except as provided in §122.426(b) of this title (relating to Clean Air Interstate Rule Permit Contents and Term), the executive director shall revise the Clean Air Interstate Rule permit, as necessary, in accordance with this chapter or the regulations for other federally enforceable permits regarding permit revisions as applicable addressing permit revisions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 3. CLEAN AIR MERCURY RULE

30 TAC §§122.440, 122.442, 122.444, 122.446, 122.448

STATUTORY AUTHORITY

The new sections are adopted under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The new sections are also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; HB 2481, §2 of the 79th Legislature, codified at §382.0173, concerning adoption of rules regarding certain SIP requirements and standards of performance for certain sources; and §382.054, concerning federal operating permits; and FCAA, 42 USC, §§7401 *et seq*., which require states to include in their SIPs adequate provisions prohibiting any source within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment, or interfere with maintenance of, the NAAQS in any other state.

The adopted new sections implement THSC, §§382.002, 382.011, 382.012, HB 2481, §2 of the 79th Legislature, codified at §382.0173, and §382.054; and FCAA, 42 USC, §§7401 *et seq*.

§122.444. Information Requirements for Mercury Budget Permit Applications.

A complete mercury budget permit application must include the following elements concerning the mercury budget source for which the application is submitted, in a format prescribed by the executive director:

(1) identification of the mercury budget source;

(2) identification of each mercury budget unit at the mercury budget source;

(3) the standard requirements under 40 CFR §60.4106;

(4) a copy of the complete certificate of representation submitted to United States Environmental Protection Agency as required under §122.440(c) of this title (relating to General Mercury Budget Trading Program Permit Requirements); and

(5) any other information requested by the executive director.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 285. ON-SITE SEWAGE FACILITIES

The Texas Commission on Environmental Quality (commission) adopts amendments to §§285.2, 285.7, 285.33, 285.50, 285.61, 285.70, 285.71, and 285.90. The commission also adopts the repeal of §285.64 and new §285.64 and §285.65. The amendments to §§285.7, 285.33, and 285.61 and new §285.64 and §285.65 are adopted *with changes* to the proposed text as published in the February 24, 2006, issue of the *Texas Register* (31 TexReg 1173). The amendments to §§285.2, 285.50, 285.70, 285.71, and 285.90 and the repeal of §285.64 are adopted *without changes* and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The adopted rules implement requirements in House Bill (HB) 2510, 79th Legislature, 2005, relating to the regulation of on-site sewage disposal systems using aerobic treatment and the maintenance of those systems. The adopted rules also address enforcement for noncompliance. HB 2510 impacts two chapters within 30 TAC. These are Chapter 30, Occupational Licenses and Registrations, and Chapter 285, On-Site Sewage Facilities. This adoption addresses the revisions to Chapter 285. The changes to Chapter 30 have previously been addressed and adopted in a separate rulemaking (Rule Project Number 2005-039-030-CE).

This adopted rulemaking addresses the registration requirements for maintenance companies that provide service or maintenance of on-site sewage disposal systems using aerobic treatment. It also addresses requirements for a homeowner who wishes to maintain the aerobic system at the homeowner's residence without the necessity of a maintenance contract with a maintenance company. Additionally, there are three changes to Chapter 285 not related to HB 2510. The first relates to revising the definition of subdivision, and the other two changes relate to more specific direction for design of mound and soil substitution disposal options.

The commission administers the On-Site Sewage Facility (OSSF) Program that currently includes executive director delegation of OSSF authority to counties, municipalities, and river authorities.

The adopted rules create requirements for maintenance companies, individuals who provide maintenance for compensation, and homeowners who perform their own maintenance. The adopted rules also clarify the definitions of maintenance company (to include the Chapter 30 definition of maintenance provider) and subdivision (to agree with the definition of subdivision within the Local Government Code). Finally, the adopted rules also clarify OSSF disposal options of mound drainfields and soil substitution drainfield design options.

The adopted rules further define the commission's regulations regarding servicing or maintenance of OSSFs using aerobic treatment under Texas Health and Safety Code (THSC), Chapter 366. The purpose of the statute is to regulate maintenance companies and their ability to service and maintain on-site sewage disposal systems using aerobic treatment. The failure of an OSSF is the fundamental cause of OSSF-related public health hazards and provides a medium for the transmission of disease. The failure of an OSSF may be caused by a number of factors, including inadequate soil texture, improper construction, improper planning, improper installation, and inadequate maintenance. Approximately 25% of all homes in Texas use OSSFs because options for centralized collection, treatment, and disposal systems are not available. In Fiscal Year 2004 alone, there were more than 41,000 newly permitted OSSFs in Texas. Of these, nearly 23,000 (53%) were aerobic systems.

The adopted rules specify requirements for maintenance companies to obtain an occupational registration to perform service and maintenance of on-site sewage disposal systems using aerobic treatment. The significant revisions in these rules include changes to the requirements for maintenance companies, installers, enforcement proceedings, and training for maintenance companies.

Finally, the adopted rules delineate the training requirements for homeowners, installers, and maintenance companies. Specifically, these rules require six hours of training for homeowners who perform their own maintenance and a minimum of 16 hours of training for registered maintenance companies.

SECTION BY SECTION DISCUSSION

The commission adopts administrative changes throughout these sections to be consistent with Texas Register requirements and other agency rules and guidelines and to conform to the drafting standards in the *Texas Legislative Council Drafting Manual*, November 2004.

Subchapter A - General Provisions

The adopted amendment to §285.2, Definitions, provides for consistency with the definition of Edwards Aquifer Recharge Zone, as provided in 30 TAC Chapter 213, Edwards Aquifer. The adopted amendment to §285.2 also provides additional scope to the definition for maintenance company to include maintenance providers, as defined in §30.7, Definitions, and to include the new provisions from HB 2510 relating to maintenance provided for compensation. Additionally, the adopted amendment to §285.2 would provide an updated definition of subdivision to reflect the subdivision definition found in Local Government Code, §232.001(a-1).

The adopted amendment to §285.7, Maintenance Requirements, provides current rules for maintenance companies, which reflects changes to THSC, §366.0515(n), relating to certification, training, and registration for both maintenance companies and individuals employed by maintenance companies. The statute also eliminates the current acceptance of a wastewater Class D license as a prerequisite for performing maintenance. However, provisions have been added for wastewater Class D licensees to continue to provide maintenance until September 1, 2008, provided that they held a valid wastewater Class D license as of August 31, 2006. Finally, the current rules allow homeowner maintenance in counties with a population less than 40,000. The adopted amendment reflects the provisions of THSC, §366.051(g) - (k), and allows homeowners in every county to perform their own aerobic system maintenance if the homeowner has six hours of commission-approved training from either the manufacturer or installer, under specified time frames, and the county has not imposed more stringent standards. The adopted amendment also provides for routine inspections by the permitting authority, not to be greater than once every five years unless the owner has failed to properly maintain the aerobic system and requires a homeowner to obtain a maintenance contract if the aerobic system is not properly maintained.

Subchapter D - Planning, Construction, and Installation Standards for OSSFs

The adopted amendment to §285.33, Criteria for Effluent Disposal System, provides the construction requirements for a mound drainfield in subsection (d)(3) and quantifies the positive allowances for slopes and the existing or new soil interface. The adopted amendment to §285.33 also provides clearer requirements for designing a soil substitution drainfield in subsection (d)(4) and does not allow for soil substitution using Class III soils, which generally tend to erratically treat and disperse effluent.

Subchapter F - Licensing and Registration Requirements for Installers, Apprentices, Designated Representatives, Site Evaluators, and Maintenance Companies

The adopted amendment to §285.50, General Requirements, provides for commission registration of maintenance companies.

The adopted amendment to §285.61, Duties and Responsibilities of Installers, provides for mandatory homeowner training by the installer of an aerobic system when requested by the homeowner.

The adopted repeal of §285.64, Suspension or Revocation of License or Registration, is replaced by new adopted §285.64, Duties and Responsibilities of Maintenance Companies. This section addresses the requirements in §285.7 for maintenance companies and assists in enforcement referrals by permitting authorities and the commission.

The adopted new §285.65, Suspension or Revocation of License or Registration, includes all of the provisions currently found in §285.64 and adds the revocation of a maintenance company's registration for failure to either properly maintain an aerobic system or submit required reports. This section reflects the provisions of §285.7 for maintenance companies and will assist in enforcement referrals.

Subchapter G - OSSF Enforcement

The adopted amendment to §285.70, Duties of Owners With Malfunctioning OSSFs, includes specific language for homeowners who desire to maintain their own aerobic systems, as reflected in §285.7(c)(4).

The adopted amendment to §285.71, Authorized Agent Enforcement of OSSFs, adds provisions in the rules for complaints regarding the performance of the maintenance of an aerobic system by maintenance companies or homeowners.

Subchapter I - Appendices

The adopted amendment to §285.90, Figures, revises references in Figure 2, the model deed and affidavit, from the Texas Natural Resource Conservation Commission (TNRCC) to the Texas Commission on Environmental Quality (TCEQ). Additionally, the adopted amendment to §285.90 adds instructions in Figure 3, the sample testing and reporting record for homeowners providing their own maintenance. This also reflects the provisions within §285.7(d), Maintenance Requirements. The adopted amendment to §285.90 also deletes Class III soils as fill in Figure 4, soil substitution drainfields for the typical drainfields - sectional view diagram. This reflects the design changes in §285.33(d)(4), Criteria For Effluent Disposal Systems, relating to soil substitution drainfields.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. Major environmental rule means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of this adoption is to implement legislation that allows regulation of on-site sewage disposal systems using aerobic treatment and the maintenance of those systems. The adopted rules also address enforcement for noncompliance. The adopted rules are intended to establish procedures for regulation and do not adversely affect, in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

In addition, the adopted rules are not subject to Texas Government Code, §2001.0225, because they do not meet the four criteria specified in §2001.0225(a). Section 2001.0225(a) applies to a rule adopted by a commission, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and a commission or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the commission instead of under a specific state law. The adopted rules do not meet any of these requirements. First, these revisions do not exceed a standard set by federal law as there are no federal requirements for maintaining OSSFs. Second, these revisions do not exceed an express requirement of state law but are being adopted to implement state law. Therefore, the rulemaking does not exceed an express requirement of state law. Third, the commission is not a party to a delegation agreement with the federal government concerning a state and federal program that would be applicable to requirements set forth in these rules. Therefore, there are no delegation agreement requirements that could be exceeded by these rules. Fourth, this adopted rulemaking does not adopt a rule solely under the general powers of the commission. The requirements that would be implemented through these rules are specified in THSC, Chapter 366, which requires the commission to enact rules governing the installation of OSSFs. Therefore, the commission does not adopt these rules solely under the commission's general powers.

Thus, a regulatory analysis is not required because the adopted rules do not meet the criteria of a major environmental rule contained in Texas Government Code, §2001.0225. The commission invited public comment but no comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission performed a preliminary assessment of these rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rules is to regulate activities having the potential for causing pollution of the waters in Texas. The rules will substantially advance this specific purpose by the regulation of on-site sewage disposal systems using aerobic treatment as well as maintenance and enforcement of those systems. Promulgation and enforcement of the adopted rules would be neither a statutory nor a constitutional taking because they do not adversely affect private real property. The rulemaking does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Texas Government Code, Chapter 2007, does not apply to this rulemaking because the promulgation and enforcement of these rules will not create a burden on private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the adoption is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq*., and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found the adopted rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the adopted rule(s) include: to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas; to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; and to ensure and enhance planned public access to and enjoyment of the coastal zone in a manner that is compatible with private property rights and other uses of the coastal zone.

CMP policies applicable to the adopted rule(s) include that commission rules under THSC, Chapter 366, governing on-site sewage disposal systems require that on-site disposal systems be located, designed, operated, inspected, and maintained so as to prevent releases of pollutants that may adversely affect coastal waters.

The adopted rules are consistent with the goals and policies because they require testing, sampling, and maintenance of aerobic systems sufficient to prevent releases of pollutants.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals

and policies because the adopted rules are consistent with these CMP goals and policies and because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas.

PUBLIC COMMENT

There was no public hearing held on this rulemaking.

RESPONSE TO COMMENTS

The commission received 29 written comments concerning the proposed rules. Comments were received from State Representative Dennis Bonnen and Dianne Helms of State Senator Craig Estes's Office, AAA Wastewater Installation & Maintenance Company, A.C.E. Wastewater Disposal System, Brazos Wastewater Systems LLC, Bell County Public Health District, Clearstream Wastewater Systems, Inc., Coleman Aerobic Septic, Environmental Construction Services, Fayette County, Harris County Public Infrastructure Department, Meiners Construction Company, Myrtle Springs Septic Systems, Snowden Onsite Septic, Inc., South Texas Wastewater Treatment, Texas On-Site Wastewater Association, Travis County Transportation and Natural Resources, Whitt Septic Systems, and ten individuals. The commenters were opposed to a variety of portions within the rulemaking, whether related to this rule adoption or not.

One individual commented concerning HB 2510 in anticipation of the proposed rules which was received September 9, 2005, and Coleman Aerobic Septic System Inspection/Maintenance submitted comments on October 31, 2005. However, both sets of comments were received well in advance of the final version and release of the proposed rules to the public, which occurred in January 2006. As a result, these comments were excluded from response.

Finally, A.C.E. Wastewater Disposal System commented on the rules during the comment period and provided the commission with a similar letter addressed to TOWA. The letter addressed to TOWA was not included in the responses. However, the letter addressed to the commission was responded to in the preamble.

General

One individual commented that the commission has allowed the septic industry to: charge high fees for aerobic system maintenance, not always require permits, not address systems in need of repair in a timely manner, and not require inspections. This individual also recommended an inspection program for all home sites with septic systems which would establish: acquisition of a timely permit, proof of a correctly functioning system, periodic inspections, and a local contact for homeowners to report overflowing systems. Another individual commented that there would be an increase in pollution due to homeowner inability to properly maintain an aerobic system.

These comments are beyond the scope of this rulemaking. However, the Chapter 285 rules address each of these comments and the commission's Web site also lists its authorized agents, their location, and contact information. No changes were made in response to this comment.

Clearstream Wastewater Systems, Inc. (Clearstream) commented that their installed systems may suffer from improper maintenance under the proposed rules and the proposed rules are excessive and impossible to comply with and contravene the specific language of HB 2510.

The commission agrees that any aerobic system may malfunction with improper maintenance. Clearstream's specific comments and the commission's responses follow in the next section, relating to specific comments. No changes were made in response to this comment.

Clearstream commented that the commission ". . . has chosen the limited statutory grant of authority in HB 2510 as a license to create an entirely new regulatory program . . . Rather than just satisfy the demands of the statute, the rule proposal takes the statute as a starting point and then creates a major new regulatory program out of whole cloth -- placing responsibilities and penalties upon wastewater system manufacturer's {*sic*} that are both in excess of what the statute requires and at times, in contravention with what the statute allows."

The commission responds that statutory authority to create a registration program was specific in Texas Health and Safety Code (THSC), §266.0515(n). Additionally, the statute specifies in §366.0515(h) that the responsibility for homeowner training go to either the manufacturer or installer. While the commission has proposed amendments to existing rules for installers with respect to homeowner training, there are no provisions for manufacturers who choose to decline to provide homeowner training for aerobic systems. However, the commission is not required to approve a manufacturer's product when the manufacturer has not satisfied conditions for review. For example, 30 TAC §285.32(c)(5) requires a review of a manufacturer's state-listed product every seven years. Manufacturers who fail to comply can have their product(s) removed (§285.32(c)(5)(D)). The commission views a manufacturer's failure to train a homeowner (when requested) as a failure to comply with the rules and the only available alternative is delisting the product(s). No changes were made in response to this comment.

Clearstream commented that while THSC, §366.0515(o), prohibits the commission from dictating to manufacturers who are to be certified as a maintenance provider, this prohibition implicitly extends to homeowner training as well.

While the commission agrees that the statute prohibits the commission from dictating to manufacturers who are to be certified, the commission disagrees that this extends equally to homeowners as it was neither stated nor included in §366.0515(h) and §366.0515(o). No changes were made in response to this comment.

Meiners Construction Company (Meiners) commented that counties should have the option of allowing homeowner maintenance.

Counties have the option of allowing or not allowing homeowner training. THSC, §366.032(b), allows authorized agents to adopt more stringent requirements when they provide greater public health and safety protection. Additionally, there are several authorized agents who have received approval to require maintenance contracts for all aerobic systems. No changes were made in response to this comment.

AAA Wastewater Installation & Maintenance Company (AAA) commented that the TCEQ is not doing its job in regulating local permitting authorities and that half of the local permitting authorities neither have the tools nor ability to accurately inspect installation work. Additionally, the TCEQ should be fining these authorized agents for not enforcing the rules.

While the comments are not part of the rulemaking, there are provisions in Subchapter B of Chapter 285 concerning delegation to

local authorities and revocation of this delegation. Revocation of an order and charge-back fees could be part of an enforcement action against an authorized agent who fails to properly carry out its duty related to OSSF. No changes were made in response to this comment.

Dianne Helms of State Senator Craig Estes's office commented that the fiscal note, under PUBLIC BENEFITS AND COSTS, stated that installers and manufacturers would be tracking and reporting to permitting authorities which homeowners have been trained to perform their own aerobic system maintenance.

The commission's proposed rules require manufacturers and installers who train homeowners to provide only a written certificate or letter to the local permitting authority, as found in §285.7(d)(4)(A)(ii). No changes were made in response to this comment.

Ms. Helms also commented that the limitation to provide aerobic system maintenance to counties of 40,000 persons was in the commission's proposed rules.

The commission could not find where the limitation was still in effect in the proposed rules. No changes were made in response to this comment.

The Harris County Public Infrastructure Department (Harris County) commented that the TCEQ's estimate of $100,000 costs to state and local governments does not include costs to the TCEQ's regional offices and that Harris County's costs would be closer to $185,000. Harris County recommended that the definition of "Maintenance" is currently overly broad, exceeds the legislative intent in the statute, and should be revised per their recommendation.

The fiscal note did not include data from Harris County regarding enforcement and additional staff costs. However, the fiscal note does say that costs would depend upon how many aerobic facilities are in the jurisdiction of the local permitting authority and the necessity for personnel and equipment upgrades as well as their ability to provide enforcement. The estimated upward cost of $100,000 may have been low for Harris County, but was based upon the best information program staff had at that time. No changes were made in response to this comment.

Environmental Construction Services (Environmental) commented that Mr. Horvath's estimate for the cost per employee was not reasonable and that $500 for the basic training cost per employee should be considered in addition to employee registration.

In the section titled SMALL AND MICRO-BUSINESS ASSESSMENT, the training class was estimated to cost between $200 and $400 at the time the fiscal note was written. Costs for training from each manufacturer was unknown at the time. The assessment incorrectly assumed a $70 per year cost for registration. Therefore, the assessment should have read "training and registration costs are estimated to be between $270 and $470" per employee performing aerobic system maintenance.

TOWA commented that there were no provisions in the proposed rules relating to continuing education requirements for maintenance providers and suggested that the commission consider doing so with an emphasis on advance maintenance provider training.

These comments are beyond the scope of this rulemaking but could be addressed in any future rulemaking for 30 TAC Chapter 30.

TOWA commented that the commission's current policy for course approval for the basic maintenance provider course is insufficient because other continuing education providers may not be sufficiently familiar with the provisions of HB 2510. TOWA encouraged the commission to ". . . follow the national standards in selecting only those with University affiliations or State/National Associations who develop training materials and provide education programs to the onsite wastewater industry."

These comments are beyond the scope of this rulemaking. No changes were made in response to this comment.

Travis County Transportation and Natural Resources Onsite Wastewater Program (Travis County) recommended revisions to other portions of the rules, such as: requiring the five-foot setback for all disposal systems (including surface application and drip irrigation), revising the requirement that any system which needs component replacement (such as replacement of a broken pipe or pump tank) not be required to meet current standards when the system does not have a history of operational problems or failure, addition of soil/material specifications for bedding pipe, adding a requirement that all non-residential OSSFs have a grease interceptor as well as a method for sizing them, such as in the Florida standards, and Table III be amended to include wastewater usage rates for businesses such as barber and beauty shops, dentist and doctor offices, churches, funeral homes, fitness gyms, self storage warehouses, carry-out food outlets, and convenience stores with fast food restaurant attachments.

These comments are beyond the scope of this rulemaking but can be addressed in future revisions to Chapter 285. No changes were made in response to this comment.

Two individuals commented that the new $70 maintenance provider registration fee was not equitable to those currently providing maintenance.

Registration fees are specified in 30 TAC Chapter 30 and are not within the scope of the Chapter 285 rules. No changes were made in response to this comment.

The Bell County Public Health District (Bell County) commented that the cost associated with homeowner training will not be reasonable for the homeowner. Meiners asked who will be paying the cost associated with training homeowners. Additionally, Bell County asked 17 questions concerning implementation of the rules. These questions were addressed in the commission's written response to Bell County, dated April 24, 2006.

The commission agrees with Bell County that the cost for homeowner training may be perceived as unreasonable but neither the statute nor the rules limit the trainer's fees and assumes that the trainer will charge the homeowner for the training. No changes were made in response to this comment.

Meiners commented that the cost of installing an aerobic system will increase.

The commission agrees that this is a possibility. No changes were made in response to this comment.

Fayette County commented that there were currently no courses available for training maintenance providers and therefore no one can comply with the proposed rules. Fayette County also commented that designated representatives (DRs) should be given the authority to issue spot citations for OSSF violations, DRs should be trained and certified to take OSSF effluent samples, conditionally legalize outhouses, eliminate the ten-acre

rule, provide state-mandated pay equity for all DRs, and to rewrite the graywater rules because they are confusing. Finally, Fayette County asked 19 questions concerning implementation of the rules.

At the time of Fayette County's letter, while there were no approved maintenance training courses, the commission had received a proposal for a maintenance provider training course which is under review. Fayette County's recommendations are beyond the scope of this rulemaking but can be considered in a future rulemaking. Finally, the commission responded to Fayette County's 19 questions concerning implementation of the rules in a letter, dated April 24, 2006. No changes were made in response to this comment.

Harris County commented that the requirement for the permitting authority to have a valid maintenance contract, as a condition to construct, should be changed to be as a condition to operate. Harris County cites doing so gives the homeowner an opportunity to solicit bids from different aerobic system manufacturers.

This statement is beyond the scope of this rulemaking. No changes to the rules were made in response to this comment.

South Texas Wastewater Treatment requested rule changes for the minimum dosing volume for spray systems, smaller minimum pump tank size, new requirements for an equalization basin to regulate effluent flow, and additional flexibility for a qualified designer in designing an on-site sewage facility.

These comments are beyond the scope of this rulemaking which is only to address the provisions of HB 2510, definitions for maintenance and subdivision, mound disposal, and soil substitution design. These comments may be addressed in a future revision of Chapter 285. No changes were made in response to this comment.

Specific

State Representative Dennis Bonnen commented that the commission redefine "Maintenance" to exclude replacement of major parts and alterations of the system. He also commented that the legislation was intended to leave major repairs to licensed professionals. Additionally, Harris County, Snowden Onsite Septic, Inc. (Snowden), and TOWA offered modifications to the existing definition for maintenance relating to the delineation of responsibility of homeowners performing their own aerobic system maintenance versus certified maintenance personnel. Harris County also recommended a new definition for "Maintenance findings."

The revised maintenance definitions recommended by the commenters propose to limit the scope of homeowners' ability to maintain their aerobic treatment unit. The 30 TAC Chapter 285 rules do not allow any change to a permitted system without the permitting authority's prior review and approval. In reviewing the proposed revised definitions and current practices in counties with a population less than 40,000, the commission envisions empowering homeowners in counties above 40,000 population with the option for all aspects of aerobic system maintenance as the smaller counties. The definition for "Alter" also requires prior review and approval from the permitting authority. Finally, Chapter 30 allows homeowner maintenance which specifically includes repairs to their own aerobic systems. No changes were made in response to this comment.

Two individuals questioned the need to license professionals who have been providing maintenance services in the past.

The statute requires all maintenance providers to be registered with the commission. No changes were made in response to this comment.

One individual asked why was maintenance limited to only those certified by the manufacturer of the commenter's aerobic system.

Section 285.7(b)(1)(A) of the proposed rules requires that maintenance be provided by an individual certified by the manufacturer of the OSSF. This is consistent with current rules in §285.7(b)(1)(A). No changes were made in response to this comment.

One individual asked why six hours of training were required for a procedure that doesn't take 45 minutes to complete.

HB 2510 specifically states that up to six hours training for homeowner maintenance is required. In this requirement, the commission is charged with developing training which includes instruction regarding public health and safety of proper maintenance of the system and a demonstration of the procedure for performing a scheduled maintenance. No changes were made in response to this comment.

Travis County commented that there is no justification for a maintenance provider to have an Installer II license and that current maintenance providers without an Installer II license may find existing maintenance contracts to be at risk for fulfilling maintenance obligations.

The commission understands Travis County's point but disagrees because the requirement was included in HB 2510 and those individuals performing maintenance without an Installer II license may continue to perform maintenance as long as they: 1) are employed in a company which employs an Installer II; 2) satisfactorily complete a 16-hour, commission-approved basic maintenance course; 3) have a business relationship with the manufacturer; and 4) complete any other reasonable requirements established by the manufacturer. Finally, the maintenance person must be certified by the manufacturer and registered with the commission. No changes were made in response to this comment.

AAA, A.C.E. Wastewater Disposal System (A.C.E.), Environmental, Meiners, Travis County, and one individual commented that there was a significant disparity between the amount of time required for a professional maintenance provider and homeowners. The disparity is between the requirement for up to six hours' training required for homeowners and a minimum of 16 hours' training for professionals. Environmental and Meiners also recommended that homeowners take the same course as maintenance providers to alleviate this disparity. Travis County recommended 12 hours' training for homeowners. Additionally, Whitt Septic Services (Whitt) commented that a 16- hour course in basic maintenance ". . . is a joke . . ." for those already performing maintenance and Meiners commented that six hours would not be a sufficient amount of time, resulting in more homeowner-maintained aerobic systems which would fail, resulting in more enforcement action for permitting authorities.

These requirements are from the statute which specify training times. No changes were made in response to this comment.

TOWA commented that 16 hours of intensive training is insufficient time for training maintenance providers but agrees with the commission's limitation of this training to classroom training.

The commission acknowledges TOWA's comment concerning the classroom-only training. The commission responds that the

basic course is intended to provide only basic information for maintenance providers, not manufacturer-specific training. No changes were made in response to this comment.

TOWA commented that they support the commission's position that the commission will not require re-certification for maintenance providers who are currently certified by a manufacturer.

The commission acknowledges TOWA's support. The commission reiterates that although a maintenance provider has a manufacturer's certification, successful completion of the basic maintenance course is still required for registration. No changes were made in response to this comment.

Two individuals commented that they are currently Installer II licensees who provide maintenance and should not be required to take a class in which they are already trained. Another individual requested an exemption for any installer who currently performs maintenance on aerobic systems.

The statute created a registration for all maintenance providers and in doing so, requires the commission to develop course work for certification by the manufacturer and registration with the commission. No changes were made in response to this comment.

Snowden commented that the statute requires an Installer II license and did not give leeway for Wastewater D licensees.

The commission proposed a two-year phaseout of the Wastewater D licensee as an option in order for all Wastewater D licensees to obtain Installer II certification or affiliate with a maintenance company that employs an Installer II. Immediate disallowance of the Wastewater D option could also jeopardize thousands of existing maintenance contracts performed by Wastewater D licensees. No changes were made in response to this comment.

One individual requested that maintenance providers with a Wastewater D license be permitted to maintain systems in perpetuity as long as all other provisions for maintenance registration are met. This individual commented that if a homeowner can be trained in six hours that the maintenance provider could be trained in the same amount of time as well.

HB 2510 states that an Installer II license must be held by at least one person in the company. Additionally, the commission proposed a two-year phaseout of the Wastewater D licensee as an option in order for all Wastewater D licensees to obtain Installer II certification or affiliate with a maintenance company that employs an Installer II. The statute also makes a distinction between homeowners and those who provide maintenance for compensation. Homeowner training is not the same for those who provide maintenance service and receive compensation. No changes were made in response to this comment.

Harris County recommended that someone other than the designer of a nonstandard system be given the flexibility to train a homeowner, in the case when the designer cannot train the homeowner.

The commission does not agree that someone other than the designer of a nonstandard system be given the flexibility to train a homeowner because doing so allows someone not intimately involved in or possibly aware of particular design details to assume responsibility of its operational training of the homeowner. However, in the case when the original designer is unavailable to train the homeowner, the commission has no objection to a local permitting authority accepting an alternate trainer, as proposed by Harris County. This could be addressed in a future revision to the Chapter 285 rules. No changes to the rules were made in response to this comment.

One individual asked what happens when the house is sold and who will be contacted to train the new homeowner(s). Finally, this individual asked if this information will be included in the sales contract.

The proposed rules provide that after a house sale, the new homeowner must obtain training from either the installer or manufacturer, as stated in §285.7(c)(3)(C). Finally, the commission neither has jurisdiction over a real estate sales contract provision nor can require this information to be part of a real estate sales contract. No changes were made in response to this comment.

One individual commented that the rules should not require homeowners who currently perform their own aerobic system maintenance from being retrained in aerobic system maintenance.

The commission agrees with this comment. Homeowners who currently perform their own aerobic system maintenance are not required to be retrained. No changes were made in response to this comment.

AAA, A.C.E., Clearstream, Meiners, Whitt, and two individuals commented that homeowners are not qualified to provide maintenance or will not provide adequate maintenance of their systems.

This requirement is the crux of this rulemaking package which allows homeowners to provide their own aerobic system maintenance. No changes were made in response to this comment.

A.C.E., Brazos, Meiners, and one individual commented that there would be a degradation in ground and surface water quality by homeowners who maintain their own systems.

The statute allows homeowners to provide their own aerobic system maintenance with training. No changes were made in response to this comment.

Harris County commented that maintenance contracts should be amended to allow electronic maintenance monitoring software as confirmation that the maintenance contract was renewed.

This comment is beyond the scope of this rulemaking. No changes to the rules were made in response to this comment.

Environmental commented that manufacturers and installers will incur liability when training a homeowner to maintain an aerobic treatment system. Environmental also provided a statement from their insurance company stating that they would not be protected under their general liability policy.

The commission cannot control if someone decides to pursue litigation. Any company or individual can be sued at any time by any party without regard to legal accuracy or sufficiency. The rules require the manufacturer or installer to train a homeowner when requested by the homeowner. No changes were made in response to this comment.

One individual agreed with the requirement that either the manufacturer or the installer train the homeowner.

The commission acknowledges this comment. No changes were made in response to this comment.

Environmental commented that there is a disparity between the need for a certification of those who train maintenance providers

while there is no certification requirement for those who train homeowners.

The commission agrees that there appears to be a disparity for training maintenance providers and homeowners. However, HB 2510 specifically states that the basic maintenance provider course be approved by the commission but did not state the same for homeowner training. As a result, the commission does not require review/approval of the homeowner training and requires review/approval of the basic maintenance provider course. Additionally, for the basic maintenance course, instructors are not certified by the commission but must meet certain qualifications, per commission Regulatory Guidance Number 373. No changes were made in response to this comment.

Clearstream, Harris County, and one individual commented that the commission's proposed rules go beyond the statutory requirement for training homeowners within the initial two-year period by requiring training when requested by the homeowner.

The commission disagrees with this comment. Limiting the rules to only new systems and those currently within the initial two-year period potentially deprives over 100,000 homeowners with aerobic systems the opportunity to perform their own maintenance. Additionally, the wording in the statute to which Clearstream and Harris County refer is followed by the words "if applicable." The commission interprets this portion of the statute to mean that homeowner training can be obtained at any time, including the initial two-year period in anticipation of the homeowner maintaining the system after the initial maintenance term has expired. No changes were made in response to this comment.

Meiners and one individual commented that third-party training for homeowners would be preferential to requiring installers and manufacturers.

The commission agrees in principle and such training would promote consistency in training for homeowners. However, training on an owner's aerobic treatment unit would necessitate the third party's approval to do so by each manufacturer, along with manufacturer-specific unit details. No changes were made in response to this comment.

One individual asked to be responsible for the required reporting to the local permitting authority and if homeowner training could be sufficient by attending an installer's training class.

An installer's training class (21 hours) is longer than the proposed six hours of homeowner training and does not sufficiently cover maintenance and reporting requirements for specific aerobic treatment units. No changes were made in response to this comment.

Clearstream commented that the commission had no authority to delist a manufacturer who refused a homeowner training when requested.

While the commission understands Clearstream's arguments, the proposed rules do not prevent any manufacturer from outsourcing training, either through its agents, installers, or training in large groups. Manufacturers must be held accountable for violating the rules in regard to homeowner training. Since the commission approves the product because it meets TCEQ requirements, the commission may also not approve the product when statute violations occur. No changes were made in response to this comment.

State Representative Dennis Bonnen commented that a 30-day training period will be burdensome to firms that have a large number of clients spread over a large area. Clearstream commented that they could not accommodate training 5,000 homeowners per month in training at their residences. Additionally, Harris County, TOWA, and one individual commented that the 30-day time frame to train a homeowner is inadequate due to logistics relating to scheduling, locations, facilities, and manpower for training. Commenters cited that this may be especially pertinent in the initial period after the rule adoption. TOWA recommended training four times per year for homeowners while Clearstream and Harris County cited the training only be offered during the initial two-year period after installation.

The statute, in §366.0515(h) states that a homeowner who purchases a residence with an aerobic treatment system has 30 days after taking possession to obtain maintenance training or else the homeowner must obtain a maintenance contract. The commission applied this same time frame to existing homeowners who wish to maintain their own aerobic system. As a result, extending the 30-day period would not be consistent with the statute. No changes were made in response to these comments.

TOWA commented that homeowner training responsibility should rest solely with the manufacturer in classes held on a quarterly basis. TOWA also commented that only the manufacturer be required to provide the permitting authority and homeowner with a written certificate or letter stating that the owner received and completed the required training.

TOWA's recommendation is well taken but HB 2510 requires either the manufacturer or installer train the homeowner. No additional changes were made in response to this comment.

Clearstream, Environmental, Harris County, and Snowden commented that installers should not be required to train homeowners in aerobic system maintenance. Additionally, A.C.E., Environmental, Meiners, Snowden, TOWA, and Whitt commented that installers are not qualified to train homeowners in aerobic system maintenance.

HB 2510 specifies that the manufacturer or installer is responsible for training a homeowner desiring aerobic system training. No changes were made in response to this comment.

Snowden commented that homeowner training should be no less than six hours.

The commission agrees and has revised §285.7(c)(4)(A)(i)(III)(-b-) to require six hours of homeowner training.

Myrtle Springs Septic Systems commented that the rules should require proof that the homeowner actually received six hours of aerobic system training in maintenance.

The rules require a letter from the trainer (manufacturer or installer) be sent to the permitting authority that the homeowner received and completed the required (six hours) training. No changes were made in response to this comment.

Environmental made a recommendation that homeowners be registered with the commission in the same manner as maintenance providers. Additionally, this registration would be used to track homeowner compliance with maintenance requirements.

Local permitting authorities will be tracking homeowners who have successfully completed training. This will be documented though the required letter provided to the permitting authority

from either the manufacturer or installer who trained the homeowner. No changes were made in response to this comment.

Clearstream commented the statute requires that a homeowner has 30 days to receive training from a certified installer after the purchase of a residence with an aerobic system maintained by the previous owner. Otherwise, the new homeowner must have a maintenance contract. Conversely, TOWA and Whitt commented that the requirement for both the installer and manufacturer to train the homeowner be amended to only require that the manufacturer train the homeowner within the 30-day period.

The commission acknowledges the language in the statute. A homeowner's ability to receive training after taking possession of a residence with an existing aerobic system is the same as any other homeowner with an aerobic system. No changes were made in response to this comment.

Whitt suggested that the commission require homeowners to have auto dialers which also alert the permitting authority of system malfunctions.

Section 285.7(d)(3) allows electronic monitoring and automatic telephone or radio access which notifies the maintenance company of system or component failure, including the amount of system disinfection. In doing so, the number of maintenance inspections may be reduced from three to two per year. This remains an option and no changes were made in response to this comment.

Harris County and Snowden commented that the commission was not given statutory authority to require manufacturers and installers to provide parts to homeowners who maintain their own aerobic system. Conversely, Whitt commented that homeowners be required to provide proof that parts within an aerobic treatment unit were replaced with the correct parts.

The commission agrees with this statement on face value. However, requiring the availability of replacement parts allows the homeowner to maintain the aerobic system with components which were certified during the National Sanitation Foundation (NSF) testing process and under which state approval was granted. The proposed rules, in §285.7(d)(4), stated that the manufacturer shall make replacement parts available and has been changed to state that both the manufacturer and installer shall make replacement parts available. Additionally, these requirements are reflected in §285.61 (relating to Duties and Responsibilities of Installers) and §285.65 (relating to Suspension or Revocation of License or Registration). No other changes were made in response to this comment.

Brazos Wastewater, TOWA, Travis County, Whitt, and one individual commented that inspections of homeowner-maintained aerobic systems should be more frequent than once every five years.

This requirement is part of the statute and states that a routine inspection cannot be made more than once every five years. However, both the current and proposed rules state that a permitting authority can inspect any OSSF if there is a complaint or a nuisance condition exists. No changes were made in response to this comment.

TOWA recommended an inspection within the initial 12 months of a system maintained by a homeowner.

The commission responds that both the current and proposed rules state that a permitting authority can inspect any OSSF if there is a complaint or a nuisance condition exists. No changes were made in response to this comment.

Travis County recommended adding the word "minimum" to §285.33 where disposal area is calculated.

The commission agrees and has modified the wording for area calculations within the sections open for revision.

Snowden recommended that the commission exclude drip irrigation from mound systems and not allow soil substitution systems when there are untested, unproven standards.

The commission disagrees because no evidence was provided which defines and supports this comment. No changes were made in response to this comment.

Travis County commented that 18 inches of soil is insufficient for the soil's filtering ability.

The commission disagrees with this comment. The combination of 12 inches of soil with less than 30% gravel, and a minimum of six inches of imported soil, combined with a pressure distribution system is already as stringent as current requirements for similar systems, such as low-pressure dosing systems. No changes were made in response to this comment.

Travis County commented that the length of the distribution calculation will encourage designs which extend into the side slopes.

The commission agrees and §285.33(d)(3)(E) has been revised to exclude the pipe within 12 inches of the side slopes.

Travis County commented that the words "covered piping" are unnecessary in §285.33(d)(3)(E)(ii)(II).

The commission agrees with the comment and has revised §285.33(d)(3)(E)(ii)(II).

Travis County commented that §285.33(d)(3)(E)(iii) requires a 7:1 side slope length to width ratio which is excessive and recommends a ratio of 4:1.

The commission agrees that a smaller length to width ratio is acceptable for certain sites. Section 285.33(d)(3)(E)(iii) is revised to define situations where the 4:1 ratio is allowed.

Travis County commented that while §285.33(d)(3)(E)(vi) requires dosing holes no more than four feet apart, three feet distance would be more appropriate.

The commission agrees with the comment and §285.33(d)(3)(E)(vi) has been revised to reflect a three-foot spacing.

Travis County commented that §285.33(d)(3)(F)(ii) requires an area credited toward a basal area must include all areas below the distribution system. Travis County recommends "may" instead of "must" in order to guide the designer into using only the portion of the mound footprint that the designer has determined as appropriate.

The commission generally agrees with this comment and has removed the word "must" from the proposed rules.

Travis County recommended low-pressure dosing of soil substitution drainfields due to the inability of gravity flow to provide a uniform loading.

The commission disagrees with the comment. The requirement of two feet of imported soil combined with gravity distribution

is consistent with existing requirements for standard subsurface disposal systems.

Travis County commented that soil substitution in certain soil strata is an incorrect use of the design.

The commission agrees and has changed §285.33(4) to include "highly permeable" before "fractured rock" and before "fissured rock." Additionally, §285.33(4)(E) was amended where it states "permeable fractured and fissured rock" to "highly permeable fractured and fissured rock."

Environmental and Whitt commented that the potential exists for installers to sell certificates to homeowners without adequately training the homeowner. Additionally, Meiners commented that homeowners may falsify reporting data to permitting authorities.

The commission agrees that the potential exists, but there are a number of requirements in both the existing and proposed rules to enforce against individuals who falsify documents and provide inadequate training. No changes were made in response to this comment.

TOWA commented that a sole proprietorship may have more than one employee and recommended §285.64(2) be amended to better reflect the statute.

The commission agrees with TOWA that regardless of the number of employees in a sole proprietorship, there must be at least one Installer II who is certified by the manufacturer to perform maintenance and registered by the commission. The revision to §285.64(2) has been made.

State Representative Dennis Bonnen commented that revoking an installer's license if they fail to meet the deadline in training a homeowner even once is ". . . overly harsh and will only decrease the number of people providing this service."

The commission responds that the proposed rules state, in §285.65(b), that ". . . revocation *may*. . ." (italics added) be considered for an installer's license for failing to provide proper maintenance training to an owner of an aerobic OSSF in a timely manner. The commission responds that this is an enforcement-related process subject to discovery and evidence which does not automatically revoke an installer's license. No changes were made in response to this comment.

TOWA commented that the commission consider requiring maintenance providers have proof of liability insurance as well as stocking approved parts and supplies for aerobic systems which they maintain in order to repair a noncompliant system within 48 hours.

The commission responds that liability insurance and what constitutes a sufficient amount of parts and supplies is a business decision to be made by the maintenance company's owner and is not part of the Chapter 285 rules. No changes were made in response to this comment.

AAA and one individual commented that the commission should impose fines for homeowners who do not properly maintain their own aerobic systems.

THSC, §366.0515(j), was amended in HB 2510 to include the requirement for an owner to have a maintenance contract if the owner's system is a nuisance or has failed a periodic inspection. The rules reflect this in §285.70. However, no fines are proposed for homeowners. No changes were made in response to this comment.

A.C.E., Brazos, and one individual commented that authorized agents will not be able to adequately inspect and enforce homeowners who maintain their own aerobic systems. Additionally, A.C.E., Meiners, and one individual commented that systems maintained by homeowners will result in an increase in complaints for authorized agents to investigate.

This rulemaking does not change the authorized agent's responsibilities in enforcing its permitting function. Additionally, provisions for enforcement against homeowners who violate the regulations are provided in §285.70 and §285.71. No changes were made in response to this comment.

Travis County recommended that Figure 4, in §285.90, be revised to include both a soil substitution bed section using gravel media and one or two mound cross sections.

The commission anticipates revising and adding significantly more information to Figure 4 during the next revision to Chapter 285. No changes were made in response to this comment.

Snowden recommended that the commission revise Table XII, in §285.91, to include septic drip systems.

A revision to Table XII is beyond the scope of this rulemaking. No changes were made in response to this comment.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §285.2, §285.7

STATUTORY AUTHORITY

The amendments are adopted under the authority granted to the commission by the Texas Legislature in Texas Water Code (TWC), Chapter 37, and THSC, Chapter 366. The amendments are also adopted under the general authority granted in TWC, §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.102, which establishes the commission's authority necessary to carry out its jurisdiction; TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013; and TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC.

The adopted amendments implement TWC, §37.002, which requires the commission to adopt rules to establish registration requirements for maintenance providers that will service and maintain on-site sewage disposal systems using aerobic treatment under THSC, §366.0515, and to impose administrative and criminal penalties under TWC, §§7.173 - 7.175.

§285.7. Maintenance Requirements.

(a) Maintenance requirements. Maintenance requirements for all on-site sewage facilities (OSSFs) are identified in §285.91(12) of this title (relating to Tables).

(b) Maintenance company.

(1) An individual must be certified by the manufacturer of an OSSF using aerobic treatment to maintain the system under a maintenance contract with the owner of the system or to provide training to the owner in maintenance of the system. A manufacturer may not unreasonably withhold certification and, except as otherwise provided by this subsection, must offer the certification to individuals who are not employees of the manufacturer on the same terms as the manufacturer offers the certification to the manufacturer's employees.

(A) Additionally, the individual shall:

(i) satisfactorily complete an executive director-approved course for persons who provide aerobic system maintenance. This course must be a minimum of 16 classroom hours of instruction in public health and safety, proper maintenance procedures, and record-keeping and reporting. This course must have been approved by the executive director after September 1, 2005;

(ii) be employed by a maintenance company in which at least one employee holds an Installer II license;

(iii) meet all of the manufacturer's criteria and requirements for entering into a business relationship; and

(iv) satisfactorily complete any other reasonable requirements imposed for certification by the manufacturer.

(B) A person providing maintenance with a valid wastewater Class D license on or before August 31, 2006, may continue to do so until August 31, 2008, provided that person also satisfies the requirements of subparagraph (A)(i), (iii), and (iv) of this title.

(2) For nonstandard systems, an individual providing maintenance shall be trained by the professional engineer or professional sanitarian responsible for preparing the planning materials for a nonstandard system.

(3) The maintenance company and the individual certified by the manufacturer will be responsible for fulfilling the requirements of the maintenance contract.

(c) Maintenance contracts. OSSFs required to have maintenance contracts are identified in §285.91(12) of this title. The OSSF shall be maintained and tested by the maintenance company holding a maintenance contract.

(1) Contract provisions. The OSSF maintenance contract shall, at a minimum:

(A) list items that are covered by the contract;

(B) specify a time frame in which the maintenance company will visit the property in response to a complaint by the property owner regarding the operation of the system;

(C) specify the name of the individual employed by the maintenance company who is certified by the manufacturer of the system and is responsible for fulfilling the terms of the maintenance contract;

(D) identify the frequency of routine maintenance and the frequency of the required testing and reporting; and

(E) identify who is responsible for maintaining the disinfection unit.

(2) Contract submittals. Unless excepted by paragraph (4) of this subsection, a copy of the signed maintenance contract shall be provided by the owner to the permitting authority before the authorization to construct is issued. Before the current contract expires, the owner of an OSSF is required to have a new maintenance contract signed. A copy of a new contract shall be submitted to the permitting authority at least 30 days before the contract expires.

(A) Initial maintenance contract. The initial written maintenance contract shall be effective for at least two years from the date the OSSF is first used. For a new single family dwelling, this date is the date of sale by the builder. For an existing single family dwelling this date is the date the notice of approval is issued by the permitting authority.

(B) Ongoing maintenance contract. After the expiration of the two-year initial maintenance contract, the owner shall have ongoing maintenance performed by either the original maintenance company or another maintenance company qualified under subsection (b)(1) of this section, unless the exceptions in paragraph (4) of this subsection apply.

(3) Amendments or terminations.

(A) If the maintenance company changes the individual certified by the manufacturer under subsection (b) (1)(A) of this section, the maintenance company shall initiate an amendment of the contract. The contract shall be amended within 30 days after the change in personnel. The permitting authority shall be provided with a copy of the amended contract within 30 days after the amended contract is signed.

(B) If the maintenance company discontinues the maintenance contract, the maintenance company shall notify, in writing, the permitting authority, the manufacturer, and the owner at least 30 days before the date service will cease.

(C) If the owner discontinues the maintenance contract, the owner shall notify, in writing, the permitting authority, the manufacturer, and the maintenance company at least 30 days before the date service will cease.

(D) If a maintenance contract is discontinued or terminated, the owner shall contract with another maintenance company and provide the permitting authority with a copy of the new signed maintenance contract no later than 30 days after termination, unless the owner meets the requirements of paragraph (4) of this subsection.

(4) Exceptions to maintenance contract. At the end of the initial two-year maintenance period, the owner of an aerobic treatment system for a single family residence shall either maintain the system personally or obtain a new maintenance contract.

(A) If the owner of an OSSF using aerobic treatment for a single-family residence elects to maintain the system directly and in accordance with §30.244(a) of this title (relating to Exemptions), the owner must obtain specific on-site maintenance training for the system from either the manufacturer or an installer who has been certified by the manufacturer.

(i) Training for the homeowner of an aerobic OSSF must be given within 30 calendar days of the date when requested by the homeowner. Additionally, this training must be completed a minimum of 30 days prior to the end of the existing maintenance contract.

(I) A manufacturer shall train the owner of the aerobic OSSF when requested by the owner, under the time frames described in this subsection. Failure to provide the owner with approved training within the specified time frame may result in removal of the manufacturer's product(s) from the list of approved systems.

(II) An installer shall train the owner of the aerobic OSSF when requested by the owner, under the time frames described in this subsection. Failure to provide the owner with approved training within the specified time frame may result in penalties to the installer, as described in §285.61 of this title (relating to Duties and Responsibilities of Installers). These penalties may include revocation of the installer's license and registration as a maintenance provider.

(III) The specific on-site maintenance training for owners of aerobic systems must:

(-a-) have been previously approved by the executive director;

(-b-) provide for six hours of training;

(-c-) be provided and completed in a timely manner that allows the owner to be trained and comply with the re-

quirements of training and maintenance of this subsection and §285.70 of this title (relating to Duties of Owners With Malfunctioning OSSFs);

(-d-) include the importance to public health and safety of proper maintenance of the system; and

(-e-) a demonstration of the procedure for performing scheduled maintenance.

(ii) Within 30 days after the owner's completion of the training, the manufacturer or installer shall provide both the owner and the permitting authority with a written certificate or letter, signed by the manufacturer or installer, stating that the owner has received and completed the required training.

(B) Maintenance of an aerobic system by a homeowner is subject to any inspection and reporting requirements imposed by an authorized agent or the commission applicable to a maintenance company that contracts to maintain a system.

(C) If the residence is sold, the new homeowner, not later than the 30th day after the date the owner takes possession of the property, must obtain the training required by this subsection from either an installer certified by the manufacturer of the system or the manufacturer. If the homeowner does not request training, then the homeowner must contract with a maintenance company for the maintenance of the system. However, this requirement does not limit a homeowner's ability to both receive training and maintain the homeowner's aerobic system as required in this paragraph.

(d) Testing and reporting. OSSFs that must be tested are identified in §285.91(12) of this title.

(1) The maintenance company, or the homeowner, if applicable under subsection (c)(4) of this section, shall test and report for each system as required in §285.90(3) of this title (relating to Figures) and §285.91(4) of this title. The report must:

(A) include any responses to owner complaints, the results of the maintenance company's findings or the owner's findings, and the test results; and

(B) be submitted to the permitting authority and, if applicable, the owner within 14 days after the date the test is performed.

(2) To provide the owner with a record of the maintenance check, the maintenance company shall install a weather resistant tag, or some other form of weather resistant identification, on the system at the beginning of each maintenance contract. This identification shall:

(A) identify the maintenance company;

(B) list the telephone number of the maintenance company;

(C) specify the start date of the contract; and

(D) be either punched or indelibly marked with the date the system was checked at the time of each maintenance check, including any maintenance check in response to owner complaints.

(3) The number of required tests may be reduced to two per year for all systems having electronic monitoring and automatic telephone or radio access that will notify the maintenance company, or the owner if applicable under subsection (c)(4) of this section, of system or components failure and will monitor the amount of disinfection in the system. The maintenance company shall be responsible for ensuring that the electronic monitoring and automatic telephone or radio access systems are working properly.

(4) The manufacturer and the installer of the installed on-site aerobic system shall make available to the homeowner all replacement parts for that aerobic system to any homeowner who elects to maintain the on-site aerobic system as identified in subsection (c)(4) of this section. Failure to do so may result in removal of the manufacturer's product(s) from the list of approved systems.

(5) An authorized agent or the commission may routinely inspect an on-site sewage system using aerobic treatment for a single-family residence that is maintained directly by the owner of the system not more than once every five years.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 14, 2006.

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Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-0177

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SUBCHAPTER D. PLANNING, CONSTRUCTION, AND INSTALLATION STANDARDS FOR OSSFS

30 TAC §285.33

STATUTORY AUTHORITY

The amendment is adopted under the authority granted to the commission by the Texas Legislature in TWC, Chapter 37, and THSC, Chapter 366. The amendment is also adopted under the general authority granted in TWC, §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.102, which establishes the commission's authority necessary to carry out its jurisdiction; TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013; and TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC.

The adopted amendment implements TWC, §37.002, which requires the commission to adopt rules to establish registration requirements for maintenance providers that will service and maintain on-site sewage disposal systems using aerobic treatment under THSC, §366.0515, and to impose administrative and criminal penalties under TWC, §§7.173 - 7.175.

§285.33. Criteria for Effluent Disposal Systems.

(a) General requirements.

(1) All disposal systems in this section shall have an approved treatment system as specified in §285.32(b) - (d) of this title (relating to Criteria for Sewage Treatment Systems).

(2) All criteria in this section shall be met before the permitting authority issues an authorization to construct.

(3) The pipe between all treatment tanks and the pipe from the final treatment tank to a gravity disposal system shall be a minimum of three inches in diameter and be American Society for Testing and Materials (ASTM) 3034, Standard dimension ratio (SDR) 35 polyvinyl chloride (PVC) pipe or a pipe with an equivalent or stronger

pipe stiffness at a 5% deflection. The pipe must maintain a continuous fall to the disposal system.

(4) The pipe from the final treatment tank to a gravity disposal system shall be a minimum of five feet in length.

(b) Standard disposal systems. Acceptable standard disposal methods shall consist of a drainfield to disperse the effluent either into adjacent soil (absorptive) or into the surrounding air through evapotranspiration (evaporation and transpiration).

(1) Absorptive drainfield. An absorptive drainfield shall only be used in suitable soil. There shall be two feet of suitable soil from the bottom of the excavation to either a restrictive horizon or to groundwater.

(A) Excavation. The excavation must be made in suitable soils as described in §285.31(b) of this title (relating to Selection Criteria for Treatment and Disposal Systems).

(i) The excavation shall be at least 18 inches deep but shall not exceed a depth of either three feet or six inches below the soil freeze depth, whichever is deeper. Single excavations shall not exceed 150 feet.

(ii) In areas of the state where annual precipitation is less than 26 inches per year (as identified in the *Climatic Atlas of Texas*, (1983) published by the Texas Department of Water Resources or other standards approved by the executive director), and suitable soils (Class Ib, II, or III) lie below unsuitable soil caps, the maximum permissible excavation depth shall be five feet.

(iii) Multiple excavations must be separated horizontally by at least three feet of undisturbed soil. The sidewalls and bottom of the excavation must be scarified as needed. When there are multiple excavations, it is recommended that the ends be looped together.

(iv) The bottom of the excavation shall be not less than 18 inches in width.

(v) The bottom of the excavation shall be level to within one inch over each 25 feet of excavation or within three inches over the entire excavation, whichever is less.

(vi) If the borings or backhoe pits excavated during the site evaluation encounter a rock horizon and the site evaluation shows that there is both suitable soil from the bottom of the rock horizon to two feet below the bottom of the proposed excavation and no groundwater anywhere within two feet of the bottom of the proposed excavation, a standard subsurface disposal system may be used, providing the following are met.

(I) The depth of the excavation shall comply with clause (i) of this subparagraph.

(II) The rock horizon shall be at least six inches above the bottom of the excavation.

(III) Surface runoff shall be prevented from flowing over the disposal area.

(IV) Subsurface flow along the top of the rock horizon shall be prevented from flowing into the excavation.

(V) The sidewall area will not be counted toward the required absorptive area.

(VI) The formulas in clause (vii)(I) - (III) of this subparagraph shall be adjusted so that no credit is given for sidewall area.

(VII) No single pipe drainfields on sloping ground as shown in §285.90(5) of this title (relating to Figures) or no systems using serial loading shall be used.

(vii) The size of the excavation shall be calculated using data from §285.91(1) and (3) of this title (relating to Tables). The soil application rate is based on the most restrictive horizon along the media, or within two feet below the bottom of the excavation. The formula A = Q/Ra shall be used to determine the total absorptive area where:
Figure: 30 TAC §285.33(b)(1)(A)(vii) (No change.)

(I) The absorptive area shall be calculated by adding the bottom area (L x W) of the excavation to the total absorptive area along the excavated perimeter 2(L+W), (in feet) multiplied by one foot.
Figure: 30 TAC §285.33(b)(1)(A)(vii)(I) (No change.)

(II) The length of the excavation may be determined as follows when the area and width are known.
Figure: 30 TAC §285.33(b)(1)(A)(vii)(II) (No change.)

(III) For excavations three feet wide or less, use the following formula, or §285.91(8) of this title to determine L.
Figure: 30 TAC §285.33(b)(1)(A)(vii)(III) (No change.)

(B) Media. The media shall consist of clean, washed and graded gravel, broken concrete, rock, crushed stone, chipped tires, or similar aggregate that is generally one uniform size and approved by the executive director. The size of the media must range from 0.75 - 2.0 inches as measured along its greatest dimension except as noted in clause (i) of this subparagraph.

(i) If chipped tires are used:

(I) a geotextile fabric heavier than specified in subparagraph (E) of this paragraph must be used; and

(II) the size of the chipped tires must not exceed three inches as measured along their greatest dimension.

(ii) Soft media such as oyster shell and soft limestone shall not be used.

(C) Drainline. The drainline shall be constructed of perforated distribution pipe and fittings in compliance with any one of the following specifications:

(i) three- or four-inch diameter PVC pipe with an SDR of 35 or stronger;

(ii) four-inch diameter corrugated polyethylene, ASTM F405 in rigid ten foot joints;

(iii) three- or four-inch diameter polyethylene smoothwall, ASTM F810;

(iv) three- or four-inch diameter PVC ASTM D2729 pipe;

(v) three- or four-inch diameter polyethylene ASTM F892 corrugated pipe with a smoothwall interior and fittings; or

(vi) any other pipe approved by the executive director.

(D) Drainline installation requirements. The drainline shall be placed in the media with at least six inches of media between the bottom of the excavation and the bottom of the drainline. The drainline shall be completely covered by the media and the drainline perforations shall be below the horizontal center line of the pipe. For typical drainfield configurations, see §285.90(5) of this title. For excavations greater than four feet in width, the maximum distance between parallel

drainlines shall be four feet (center to center). Multiple drainlines shall be manifolded together with solid or perforated pipe. Additionally, the ends of the multiple drainlines opposite the manifolded end shall either be manifolded together with a solid line, looped together using a perforated pipe and media, or capped.

(E) Permeable soil barrier. Geotextile fabric shall be used as the permeable soil barrier and shall be placed between the top of the media and the excavation backfill. Geotextile fabric shall conform to the following specifications for unwoven, spun-bounded polypropylene, polyester, or nylon filter wrap.
Figure: 30 TAC §285.33(b)(1)(E) (No change.)

(F) Backfilling. Only Class Ib, II, or III soils as described in §285.30 of this title (relating to Site Evaluation) shall be used for backfill. Class Ia and IV soils are specifically prohibited for use as a backfill material. The backfill material shall be mounded over the excavated area so that the center of the backfilled area slopes down to the outer perimeter of the excavated area to allow for settling. Surface runoff impacting the disposal area is not permitted and the diversion method shall be addressed during development of the planning materials.

(G) Drainfields on irregular terrain. Where the ground slope is greater than 15% but less than 30%, a multiple line drainfield may be constructed along descending contours as shown in §285.90(5) of this title. An overflow line shall be provided from the upper excavations to the lower excavations. The overflow line shall be constructed from solid pipe with an SDR of 35 or stronger, and the excavation carrying the overflow pipe shall be backfilled with soil only.

(H) Drainfield plans. A number of sketches, specifications, and details for drainfield construction are provided in §285.90(4) and (5) of this title.

(2) Evapotranspirative (ET) system. An ET system may be used in soils which are classified as unsuitable for standard subsurface absorption systems according to §285.31(b) of this title with respect to texture, restrictive horizons, or groundwater. Water saving devices must be used if an ET system is to be installed. ET systems shall only be used in areas of the state where the annual average evaporation exceeds the annual rainfall. Evaporation data is provided in §285.91(7) of this title.

(A) Liners. An impervious liner shall be used between the excavated surface and the ET system in all Class Ia soils, where seasonal groundwater tables penetrate the excavation, and where a minimum of two feet of suitable soil does not exist between the excavated surface and either a restrictive horizon or groundwater. Liners shall be rubber, plastic, reinforced concrete, gunite, or compacted clay (one foot thick or more). If the liner is rubber or plastic, it must be impervious, and each layer must be at least 20 mils thick. Rubber or plastic liners must be protected from exposed rocks and stones by covering the excavated surface with a uniform sand cushion at least four inches thick. Clay liners shall have a permeability of 10 -7 centimeters/second or less, as tested by a certified soil laboratory.

(B) ET system sizing. The following formula shall be used to calculate the top surface area of an ET system.
Figure: 30 TAC §285.33(b)(2)(B) (No change.)
The owner of the ET system shall be advised by the person preparing the planning materials of the limits placed on the system by the Q selected. If the Q is less than required by §285.91(3) of this title, the flow rate shall be included as a condition to the permit, and stated in an affidavit properly filed and recorded in the deed records of the county as specified in §285.3(b)(3) of this title (relating to General Requirements).

(C) Backfill material. Backfill material shall consist of Class II soil as described in §285.30 of this title. All drainlines must be surrounded by a minimum of one foot of media. Backfill shall be used to fill the excavation between the media to allow the backfill material to contact the bottom of the excavation.

(D) Vegetative cover for transpiration. The final grade shall be covered with vegetation fully capable of taking maximum advantage of transpiration. Evergreen bushes with shallow root systems may be planted in the disposal area to assist in water uptake. Grasses with dormant periods shall be overseeded to provide year-round transpiration.

(E) ET systems. ET systems shall be divided into two or more equal excavations connected by flow control valves. One excavation may be removed from service for an extended period of time to allow it to dry out and decompose biological material which might plug the excavation. If one of the excavations is removed from service, the daily water usage must be reduced to prevent overloading of the excavation(s) still in operation. Normally, an excavation must be removed from service for two to three dry months for biological breakdown to occur.

(F) ET system plans. A number of sketches for ET system construction are provided in §285.90(4) and (5) of this title.

(3) Pumped effluent drainfield. Pumped effluent drainfields shall use the specifications for low- pressure dosed drainfields described in subsection (d)(1) of this section, with the following exceptions.

(A) Applicability. If the slope of the site is greater than 2.0%, pumped effluent drainfields shall not be used. Pumped effluent drainfields may only be used by single family dwellings.

(B) Length of distribution pipe. There shall be at least 1,000 linear feet of perforated pipe for a two bedroom single family dwelling. For each additional bedroom, there shall be an additional 400 linear feet of perforated pipe. No individual distribution line shall exceed 70 feet in length from the header.

(C) Excavation width and horizontal separation. The excavated area shall be at least six inches wide. There shall be at least three feet of separation between trenches.

(D) Lateral depth and vertical separation. All drainfield laterals shall be between 18 inches and three feet deep. There shall be a minimum vertical separation distance of one foot from the bottom of the excavation to a restrictive horizon, and a minimum vertical separation of two feet from the bottom of the excavation to groundwater.

(E) Media. Each dosing pipe shall be placed with the drain holes facing down and placed on top of at least six inches of media (pea gravel or media up to two inches measured along its greatest dimension).

(F) Pipe and hole size. The distribution (dosing) and manifold (header) pipe shall be 1.25 - 1.5 inches in diameter. The manifold may have a diameter larger than the distribution pipe, but shall not exceed 1.5 inches in diameter. Distribution (dosing) pipe holes shall be 3/16 - 1/4 inch in diameter and shall be spaced five feet apart.

(G) Pump size. Pumped effluent drainfields shall use at least a 1/2 horsepower pump.

(H) Backfilling. Only Class Ib, II, or III soils as described in §285.30(b)(1)(A) of this title shall be used for backfill.

(c) Proprietary disposal systems.

(1) Gravel-less drainfield piping. Gravel-less pipe may be used only on sites suitable for standard subsurface sewage disposal methods. Gravel-less pipe shall be eight-inch or ten-inch diameter corrugated perforated polyethylene pipe. The pipe shall be enclosed in a layer of unwoven spun- bonded polypropylene, polyester, or nylon filter wrap. Gravel-less pipe shall meet ASTM F-667 Standard Specifications for large diameter corrugated high density polyethylene (ASTM D 1248) tubing. The filter cloth must meet the same material specifications as described under subsection (b)(1)(E) of this section.

(A) Planning parameters. Gravel-less drainfield pipe may be substituted for drainline pipe in both absorptive and ET systems. When gravel-less pipe is substituted, media will not be required. ET systems shall be backfilled with Class II soils only. All other planning parameters for absorptive or ET systems apply to drainfields using gravel-less pipe.

(B) Installation. The connection from the solid line leaving the treatment tank to the gravel-less line shall be made by using an eight or ten-inch offset connector. The gravel-less line shall be laid level, the continuous stripe shall be up, and the lines shall be joined together with couplings. A filter cloth must be pulled over the joint to eliminate soil infiltration. The gravel-less pipe must be held in place during initial backfilling to prevent movement of the pipe. The end of each gravel-less line shall have an end cap and an inspection port. The inspection port shall allow for easy monitoring of the amount of sludge or suspended solids in the line, and allow the distribution lines to be back-flushed.

(C) Drainfield sizing. To determine appropriate drainfield sizing, use a drainfield width of W = 2.0 feet for an eight-inch diameter gravel-less pipe, and an excavation width of W = 2.5 for a ten-inch gravel-less pipe.
Figure: 30 TAC §285.33(c)(1)(C) (No change.)

(2) Leaching chambers. Leaching chambers are bottomless chambers that are installed in a drainfield excavation with the open bottom of the chamber in direct contact with the excavation. The ends of the chamber rows shall be linked together with non-perforated sewer pipe. The chambers shall completely cover the excavation, and adjacent chambers must be in contact with each other in such a manner that the chambers will not separate. To obtain the reduction in drainfield size allowed in subparagraph (A)(i) and (ii) of this paragraph for excavations wider than the chambers, the chambers shall be placed edge to edge.

(A) The following formulas shall be used to determine the length of an excavation using leaching chambers.

(i) The following formula is used for leaching chambers without water saving devices.
Figure: 30 TAC §285.33(c)(2)(A)(i) (No change.)

(ii) The following formula is used for leaching chambers with water saving devices.
Figure: 30 TAC §285.33(c)(2)(A)(ii) (No change.)

(B) Leaching chambers shall not be used for absorptive drainfields in Class Ia or IV soils. Leaching chambers may be used instead of media in ET systems, low-pressure dosed drainfields, and soil substitution drainfields; however, the size of the drainfield shall not be reduced from the required area.

(C) Backfill covering leaching chambers shall be Class Ib, II, or III soil.

(3) Drip irrigation. Drip irrigation systems using secondary treatment may be used in all soil classes including Class IV soils. The system must be equipped with a filtering device capable of filtering particles larger than 100 microns and that meets the manufacturer's requirements.

(A) Drainfield layout. The drainfield shall consist of a matrix of small-diameter pressurized lines, buried at least six inches deep, and pressure reducing emitters spaced at a maximum of 30-inch intervals. The pressure reducing emitter shall restrict the flow of effluent to a flow rate low enough to ensure equal distribution of effluent throughout the drainfield.

(B) Effluent quality. The treatment preceding a drip irrigation system shall treat the wastewater to secondary treatment as described in §285.32(e) of this title unless the drip irrigation system has been approved by the executive director as a proprietary disposal system without the use of secondary treatment.

(C) System flushing. Systems must be equipped to flush the contents of the lines back to the pretreatment unit when intermittent flushing is used. If continuous flushing is used during the pumping cycle, the contents of the lines must be returned to the pump tank.

(D) Loading rates. Pressure reducing emitters can be used in all classes of soils using loading rates specified in §285.91(1) of this title. Pressure reducing emitters are assumed to wet four square feet of absorptive area per emitter; however, overlapping areas shall only be counted once toward absorptive area requirements. The loading rate shall be based on the most restrictive soil horizon within one foot of the pressure reducing emitter. When solid rock is less than 12 inches below the pressure reducing emitter, the loading rate shall be based on Class IV soils.

(E) Vertical separation distance. There shall be a minimum of one foot of soil between the pressure reducing emitter and groundwater and six inches between the pressure reducing emitter and solid rock, or fractured rock. For proprietary disposal systems that do not pretreat to secondary treatment, there shall be two feet of soil between the groundwater and pressure reducing emitter and one foot of soil between solid rock or fractured rock and the pressure reducing emitter.

(F) Labeling or listing. All drip irrigation system devices shall either be labeled by the manufacturer as suitable for use with domestic sewage, or be on the list of approved devices maintained by the executive director according to §285.32(c)(4) of this title.

(4) Approval of proprietary disposal systems. All proprietary disposal systems, other than those described in this section, shall be approved by the executive director before they may be used. Proprietary disposal systems shall be approved by the executive director using the procedures established in §285.32(c)(4)(B) of this title.

(d) Nonstandard disposal systems. All disposal systems not described or defined in subsections (b) and (c) of this section are nonstandard disposal systems. Planning materials for nonstandard disposal systems must be developed by a professional engineer or professional sanitarian using basic engineering and scientific principles. The planning materials for paragraphs (1) - (5) of this subsection shall be submitted to the permitting authority and the permitting authority shall review and either approve or disapprove them on a case-by-case basis according to §285.5 of this title (relating to Submittal Requirements for Planning Materials). Electrical wiring for nonstandard disposal systems shall be installed according to §285.34(c) of this title (relating to Other Requirements). Upon approval of the planning materials, an authorization to construct will be issued by the permitting authority. Approval for a nonstandard disposal system is limited to the specific system described in the planning materials for the specific location. The systems identified in paragraphs (1) - (5) of this subsection must

meet these requirements, in addition to the requirements identified for each specific system in this section.

(1) Low-pressure dosed drainfield. Effluent from this type of system shall be pumped, under low pressure, into a solid wall force main and then into a perforated distribution pipe installed within the drainfield area.

(A) The effluent pump in the pump tank must be capable of an operating range that will assure that effluent is delivered to the most distant point of the perforated piping network, yet not be excessive to the point that blowouts occur.

(B) A start/stop switch or timer must be included in the system to control the dosing pump. An audible and visible high water alarm, on an electric circuit separate from the pump, must be provided.

(C) Pressure dosing systems shall be installed according to either design criteria in the *North Carolina State University Sea Grant College Publication UNC-S82-03* (1982) or other publications containing criteria or data on pressure dosed systems which are acceptable to the permitting authority. Additionally, the following sizing parameters are required for all low-pressure dosed drainfields and shall be used in place of the sizing parameters in the *North Carolina State University Sea Grant College Publication* or other acceptable publications.

(i) The low-pressure dosed drainfield area shall be sized according to the effluent loading rates in §285.91(1) of this title and the wastewater usage rates in §285.91(3) of this title. The effluent loading rate (Ra) in the formula in §285.91(1) of this title shall be based on the most restrictive horizon one foot below the bottom of the excavation. Excavated areas can be as close as three feet apart, measured center to center. All excavations shall be at least six inches wide. To determine the length of the excavation, use the following formulas, where L = excavation length, and A = absorptive area.

(I) If the media in the excavation is at least one foot deep, the length of the excavation is L = A/(w+2) where:

(-a-) w = the width of the excavation for excavations one foot wide or greater; or

(-b-) w = 1 for all excavations less than one foot wide.

(II) If the media in the excavation is less than one foot deep, the length of the excavation is L = A/(w + 2H), where H = the depth of the media in feet and:

(-a-) w = the width of the excavation for excavations one foot wide or greater; or

(-b-) w = 1 for all excavations less than one foot wide.

(ii) Each dosing pipe shall be placed with the drain holes facing down and placed on top of at least six inches of media (pea gravel or media up to two inches measured along the greatest dimension).

(iii) Geotextile fabric meeting the criteria in subsection (b)(1)(E) of this section shall be placed over the media. The excavation shall be backfilled with Class Ib, II, or III soil.

(iv) There shall be a minimum of one foot of soil between the bottom of the excavation and solid or fractured rock. There shall be a minimum of two feet of soil between the bottom of the excavation and groundwater.

(2) Surface application systems. Surface application systems include those systems that spray treated effluent onto the ground.

(A) Acceptable surface application areas. Land acceptable for surface application shall have a flat terrain (with less than or equal to 15% slope) and shall be covered with grasses, evergreen shrubs, bushes, trees, or landscaped beds containing mixed vegetation. There shall be nothing in the surface application area within ten feet of the sprinkler which would interfere with the uniform application of the effluent. Sloped land (with greater than 15%) may be acceptable if it is properly landscaped and terraced to minimize runoff.

(B) Unacceptable surface application areas. Land that is used for growing food, gardens, orchards, or crops that may be used for human consumption, as well as unseeded bare ground, shall not be used for surface application.

(C) Technical report. A technical report shall be prepared for any system using surface application and shall be submitted with the planning materials required in §285.5(a) of this title. The technical report shall describe the operation of the entire on-site sewage facility OSSF system, and shall include construction drawings, calculations, and the system flow diagram. Proprietary aerobic systems may reference the executive director's approval list instead of furnishing construction drawings for the system.

(D) Effluent disinfection. Treated effluent must be disinfected before surface application. Approved disinfection methods shall include chlorination, ozonation, ultraviolet radiation, or other method approved by the executive director. Tablet or other dry chlorinators shall use calcium hypochlorite properly labeled for wastewater disinfection. The effectiveness of the disinfection procedure will be established by monitoring either the fecal coliform count or total chlorine residual from representative effluent grab samples as directed in the testing and reporting schedule. The frequency of testing, the type of tests, and the required results are shown in §285.91(4) of this title.

(E) Minimum required application area. The minimum surface application area required shall be determined by dividing the daily usage rate (Q), established in §285.91(3) of this title, by the allowable surface application rate (Ri = effective loading rate in gallons per square foot per day) found in §285.90(1) of this title or as approved by the permitting authority.

(F) Landscaping plan. Applications for surface application disposal systems shall include a landscape plan. The landscape plan shall describe, in detail, the type of vegetation to be maintained in the disposal area. Surface application systems may apply treated and disinfected effluent upon areas with existing vegetation. If any ground within the proposed surface application area does not have vegetation, that bare area shall be seeded or covered with sod before system start-up. The vegetation shall be capable of growth, before system start-up.

(G) Uniform application of effluent. Distribution pipes, sprinklers, and other application methods or devices must provide uniform distribution of treated effluent. The application rate must be adjusted so that there is no runoff.

(i) Sprinkler criteria. The maximum inlet pressure for sprinklers shall be 40 pounds per square inch. Low angle nozzles (15 degrees or less in trajectory) shall be used in the sprinklers to keep the spray stream low and reduce aerosols. If the separation distance between the property line and the edge of the surface application area is less than 20 feet, sprinkler operation shall be controlled by commercial irrigation timers set to spray between midnight and 5:00 a.m.

(ii) Planning criteria. Circular spray patterns may overlap to cover all irrigated area including rectangular shapes. The overlapped area will be counted only once toward the total application

area. For large systems, multiple sprinkler heads are preferred to single gun delivery systems.

(iii) Effluent storage and pumping requirements.

(I) For systems controlled by a commercial irrigation timer and required to spray between midnight and 5:00 a.m., there shall be at least one day of storage between the alarm-on level and the pump-on level, and a storage volume of one-third the daily flow between the alarm-on level and the inlet to the pump tank.

(II) For systems not controlled by a commercial irrigation timer, the minimum dosing volume shall be at least one-half the daily flow, and a storage volume of one-third the daily flow between the alarm-on level and the inlet to the pump tank.

(III) Pump tank construction and installation shall be according to §285.34(b) of this title.

(iv) Distribution piping. Distribution piping shall be installed below the ground surface and hose bibs shall not be connected to the distribution piping outside the pump tank. An unthreaded sampling port shall be provided in the treated effluent line in the pump tank.

(v) Color coding of distribution system. Effective 365 days after the effective date of these rules, all new distribution piping, fittings, valve box covers, and sprinkler tops shall be permanently colored purple to identify the system as a reclaimed water system according to Chapter 210 of this title (relating to Use of Reclaimed Water).

(3) Mound drainfields. A mound drainfield is an absorptive drainfield constructed above the native soil surface. The mound consists of a distribution area installed within fill material placed on the native soil surface. The required area of the fill material is a function of the texture of the native soil surface, the depth of the native soil, basal area sizing considerations, and sideslope requirements. A description of mound construction, as well as construction requirements not addressed in this section can be found in the *North Carolina State University Sea Grant College Publication UNC-SG-82-04* (1982).

(A) A mound drainfield shall only be installed at a site where there is at least one foot of native soil; however, approval for installation on sites with less than one foot of native soil may be granted by the permitting authority on a case-by-case basis.

(B) Mounds and mound distribution systems must be constructed with the longest dimension parallel to the contour of the site.

(C) Soil classification, loading rates (R(a)), and wastewater usage rates (Q) shall all be obtained from this chapter.

(D) The depth of soil material (with less than 30% gravel) between the bottom of the media and a restrictive horizon must be at least 1.5 feet to the restrictive horizon or two feet to groundwater. The soil material includes both the fill and the native soil.

(E) The distribution area is defined as the interface area between the media containing the distribution piping and the fill material or the native soil, if applicable. The distribution length is the dimension parallel with the contour and equivalent to the length of the distribution media which must also run parallel with the contour. The distribution lines within the distribution media must extend to 12 inches of the end of the distribution media. The distribution width is defined as the distribution area divided by the distribution length.

(i) The formula A(d) = Q/R(a) shall be used for calculating the minimum required distribution area of the mound where:
Figure: 30 TAC §285.33(d)(3)(E)(i)

(ii) The area credited toward the minimum required distribution area can be determined in either of the following ways.

(I) If the distribution area consists of a continuous six-inch layer of media over the fill, the credited area is the bottom interface area between the media and soil beneath the media.

(II) If the distribution area consists of rows of media and distribution piping, the credited area can be calculated using the formulas listed in paragraph (1)(C)(i)(I) or (II) of this subsection depending on the depth of the media.

(iii) For sites with greater than 2% slopes and solid bedrock, saturated zones, or class IV horizons within two feet of the native soil surface, the length to width ratio of the distribution area must be at least 7 : 1. For sites with greater than 2% slopes and no solid bedrock, saturated zones, or class IV horizons within two feet of the native soil surface, the length to width ratio of the distribution area must be at least 4 : 1. No length to width ratio is required on a site with 2% slope or less.

(iv) Effluent must be pressure dosed into the distribution piping to ensure equal distribution and to control application rates.

(v) If a continuous layer of media is used, the dosing lines must not be spaced more than three feet apart. If rows of media are used, the rows may be as close as three feet apart, measured edge to edge.

(vi) The dosing holes must not be greater than three feet apart.

(F) The basal area is defined as the interface area between the native soil surface and the fill material. The formula A(b) = Q/R(a) must be used for calculating the minimum required basal area of the mound where:
Figure: 30 TAC §285.33(d)(3)(F)

(i) On sites with greater than 2% slope, the area credited toward the required minimum basal area is computed by multiplying the length of the distribution system by the distance from the upslope edge of the distribution system to the downslope toe of the mound.

(ii) On sites with 2% slopes or less, the area credited toward the minimum required basal area sizing includes all areas below the distribution system as well as the side slope area on all side slope areas greater than six inches deep.

(G) Mounds shall only be installed on sites with less than 10% slope.

(H) The toe of the mound is considered the edge of the soil absorption system.

(I) The side slopes must be no steeper than three to one.

(J) There must be at least six inches of backfill over the distribution media and the mound shall be crowned to shed water.

(4) Soil substitution drainfields. Soil substitution drainfields may be constructed in Class Ia soils, highly permeable fractured rock, highly permeable fissured rock, or Class II and III soils with greater than 30% gravel.

(A) A soil substitution drainfield must not be used in Class IV soils or Class IV soils with greater than 30% gravel. Class III or IV soil shall not be used as the substituted soil in a soil substitution drainfield. There must be at least two feet of substituted soil between the bottom of the media and groundwater.

(B) A soil substitution drainfield is constructed similar to a standard absorptive drainfield except that a minimum two foot thick Class Ib or Class II soil buffer shall be placed below and on all sides of the drainfield excavation. The soil buffer must extend at least to the top of the media. The two-foot buffer area along the sides of the excavation is not credited as bottom area in calculating absorptive area. However, the interface between the media and the substituted soil is credited as absorptive area.

(C) Soil substitution drainfields must be designed to address soil compaction to prevent unlevel disposal. It is recommended that low-pressure dosing be used for effluent distribution. The edge of the substituted soil is considered the edge of the soil absorption drainfield in determining the appropriate separation distances as listed in §285.91(10) of this title.

(D) Class Ia soils do not provide adequate treatment of wastewater through soil contact. A soil substitution drainfield may be constructed in Class Ia soils in order to provide adequate soil for treatment. Absorptive area sizing must be based on the textural class of the substituted soil and must follow the formulas in subsection (b)(1)(A)(vii)(I) of this section.

(E) Highly permeable fractured and fissured rock, which contains soil in the fractures and fissures, does not provide adequate treatment of wastewater through soil contact. A soil substitution drainfield can be constructed in this permeable fractured and fissured rock in order to provide adequate soil for treatment. Absorptive area sizing must be based on the most restrictive textural class between either the native soil residing in the fractures or fissures or the substituted soil. The sizing must follow the formulas in subsection (b)(1)(A)(vii)(I) of this section.

(F) Class II and III soils with greater than 30% gravel do not provide adequate treatment of wastewater through soil contact. A soil substitution drainfield can be constructed in Class II or III soils with greater than 30% gravel in order to provide adequate soil for treatment. Absorptive area sizing must be based on the most restrictive textural class between either the non-gravel portion of the native soil or the substituted soil. The sizing must follow the formulas in subsection (b)(1)(A)(vii)(I) of this section.

(5) Drainfields following secondary treatment and disinfection. Subsurface drainfields following secondary treatment and disinfection may be constructed in Class Ia soils, fractured rock, fissured rock, or other conditions where insufficient soil depth will allow septic tank effluent to reach fractured rock or fissured rock, as long as the following conditions are met.

(A) Drainfield sizing.

(i) If the unsuitable feature is Class Ia soil, the disposal area sizing shall be based on the application rate for Class Ib soil. Some form of pressure distribution shall be used for effluent disposal.

(ii) If the unsuitable feature is fractured or fissured rock, the system sizing should be based on the application rate for Class III soil. Some form of pressure distribution system shall be used for effluent disposal.

(B) Effluent disinfection. Treated effluent must be disinfected as indicated in §285.32(e) of this title before discharging into the drainfield.

(C) Other requirements. The affidavit, maintenance, and testing and reporting requirements of §285.3(b)(3) of this title and §285.7(a) and (d) of this title (relating to Maintenance Requirements) apply to these systems.

(6) All other nonstandard disposal systems. The planning materials for all non-standard disposal systems not described in paragraphs (1) - (5) of this subsection shall be submitted to the executive director for review according to §285.5(b)(2) of this title before the systems can be installed.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. LICENSING AND REGISTRATION REQUIREMENTS FOR INSTALLERS, APPRENTICES, DESIGNATED REPRESENTATIVES, SITE EVALUATORS, AND MAINTENANCE COMPANIES

30 TAC §§285.50, 285.61, 285.64, 285.65

STATUTORY AUTHORITY

The amendments and new sections are adopted under the authority granted to the commission by the Texas Legislature in TWC, Chapter 37, and THSC, Chapter 366. The amendments and new sections are also adopted under the general authority granted in TWC, §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.102, which establishes the commission's authority necessary to carry out its jurisdiction; TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013; and TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC.

The adopted amendments and new sections implement TWC, §37.002, which requires the commission to adopt rules to establish registration requirements for maintenance providers that will service and maintain on-site sewage disposal systems using aerobic treatment under THSC, §366.0515, and to impose administrative and criminal penalties under TWC, §§7.173 - 7.175.

§285.61. Duties and Responsibilities of Installers.

An installer shall:

(1) possess a current Installer I or Installer II license before beginning construction of an on-site sewage facility (OSSF);

(2) record the installer's license number on all bids, proposals, contracts, invoices, proposed construction drawings, or other correspondence with owners, the executive director, or authorized agents;

(3) provide true and accurate information on any application or any other documentation;

(4) begin the construction of an OSSF only after obtaining documentation that the owner, or owner's agent, has the permitting authority's authorization to construct, unless a permit is not required;

(5) notify the permitting authority of the date on which the installer plans to begin the construction of an OSSF, unless a permit is not required;

(6) construct an OSSF to meet the minimum criteria required by this chapter or the more stringent requirements of the permitting authority;

(7) construct the OSSF that has been authorized by the permitting authority for the specific location identified in the site evaluation;

(8) stop construction and return to the permitting authority to change the planning materials for the permit if site or soil conditions, materials, or supplies make compliance with the planning materials impossible;

(9) be present at the job site during the construction of the OSSF or be represented by an apprentice;

(10) be present at the job site at least once each work day if the OSSF work is supervised by an apprentice and verify that the work performed by the apprentice is according to the requirements of this chapter;

(11) request the initial, final, and any other required inspection or inspections from the permitting authority;

(12) refrain from removing materials from, or altering components of, an OSSF after the final inspection;

(13) submit to the permitting authority, within 72 hours of starting emergency repairs, a written statement describing the need for any emergency repair and the work performed;

(14) perform maintenance, keep a maintenance record, and submit maintenance reports to the permitting authority and the owner for an OSSF for which the installer has contracted to provide maintenance or, when requested by the homeowner of an aerobic OSSF, train the owner according to §285.7 of this title (relating to Maintenance Requirements);

(15) maintain a current address and phone number with the executive director and submit any change in address or phone number in writing within 30 days after the date of the change; and

(16) when requested by the homeowner, make replacement parts available to all homeowners who have been trained to maintain their own aerobic system.

§285.64. Duties and Responsibilities of Maintenance Companies.

A maintenance company shall:

(1) possess a current registration from the executive director and a current certification from the manufacturer;

(2) employ at least one individual who is licensed as an Installer II and who is certified by the manufacturer of the on-site sewage facility (OSSF) system as qualified to provide maintenance services;

(3) ensure maintenance of accurate records of permitting, fees, inspections, and reports;

(4) satisfy the requirements of the maintenance contract between the homeowner of the OSSF system and the maintenance company according to §285.7(a) of this title (relating to Maintenance Requirements);

(5) maintain a current address and phone number with the executive director and submit any change in address or phone number to the executive director in writing within 30 days after the date of the change;

(6) perform maintenance on each OSSF system under executed contract, keep a maintenance record, and submit maintenance reports to the permitting authority and the owner of the OSSF for whom the installer has contracted to provide maintenance, according to §285.7 of this title; and

(7) provide maintenance training to any homeowner of an aerobic on-site sewage system when requested, according to §285.7 of this title.

§285.65. Suspension or Revocation of License or Registration.

(a) Suspension. In addition to the items listed in §30.33 of this title (relating to License or Registration Denial, Warning, Suspension, or Revocation), the executive director may suspend the following licenses for the following reasons.

(1) An on-site sewage facility (OSSF) installer's license can be suspended for:

(A) failing to perform required maintenance on an OSSF for at least eight consecutive months (the failure to maintain records is evidence of failure to perform maintenance on the OSSF);

(B) failing to properly submit maintenance reports required by §285.7(d) of this title (relating to Maintenance Requirements) for an individual OSSF in a 12-month period;

(C) failing to properly submit four or more required OSSF maintenance reports over any two-year period;

(D) failing to provide proper maintenance training to an owner of an aerobic OSSF when requested by the owner;

(E) failing to provide proper maintenance training to an owner of an aerobic OSSF with a commission-approved course; or

(F) failure to make replacement parts available to all homeowners who have been trained to maintain their own aerobic system.

(2) A designated representative's license can be suspended for:

(A) failing to verify, before the initial inspection for a particular OSSF, that the individual installing the OSSF is a properly licensed installer;

(B) failing to investigate nuisance complaints or complaints against installers, within 30 days of receipt of the complaint, according to §285.71 of this title (relating to Authorized Agent Enforcement of OSSFs); or

(C) failing to enforce the requirements of an order, ordinance, or resolution of an authorized agent;

(b) Revocation. In addition to the items listed in §30.33 of this title, the executive director may revoke an OSSF installer's license, a designated representative's license, a site evaluator's license, an apprentice's registration, or a maintenance company's registration for the following reasons.

(1) An OSSF installer's license can be revoked for:

(A) constructing, or otherwise facilitating the construction of, an OSSF that is not in compliance with this chapter;

(B) allowing, or beginning, the construction of an OSSF without a permit when a permit is required;

(C) failing to provide proper maintenance training to an owner of an aerobic OSSF when requested by the owner;

(D) failing to provide proper maintenance training to an owner of an aerobic OSSF in a timely manner; or

(E) failing to provide proper maintenance training to an owner of an aerobic OSSF with a commission-approved course.

(2) A designated representative's license can be revoked for:

(A) approving construction of an OSSF that is not in conformance with this chapter, the authorized agent's approved order, ordinance, or resolution or the notice of approval;

(B) practicing as an apprentice or an installer in the authorized agent's area of jurisdiction while employed, appointed, or contracted by that authorized agent; or

(C) working for a maintenance company in the authorized agent's area of jurisdiction while employed, appointed, or contracted by that authorized agent.

(3) A site evaluator's license can be revoked for failing to maintain a current Installer II license, designated representative license, professional engineer license, professional sanitarian license, or a certified professional soil scientist certificate.

(4) An apprentice's registration can be revoked for:

(A) acting as, advertising, or performing duties and responsibilities of an installer without the direct supervision of, or direct communication with, the supervising installer; or

(B) receiving compensation for an OSSF installation from someone other than the supervising installer.

(5) A maintenance company's registration can be revoked for:

(A) failing to perform required maintenance on an aerobic OSSF in a 12-month period; or

(B) failing to properly submit maintenance reports required by §285.7(d) of this title for an individual homeowner in any consecutive 12-month period.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. LICENSING AND REGISTRATION REQUIREMENTS FOR INSTALLERS, APPRENTICES, DESIGNATED REPRESENTATIVES, AND SITE EVALUATORS

30 TAC §285.64

STATUTORY AUTHORITY

The repeal is adopted under the authority granted to the commission by the Texas Legislature in TWC, Chapter 37, and THSC, Chapter 366. The repeal is also adopted under the general authority granted in TWC, §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.102, which establishes the commission's authority necessary to carry out its jurisdiction; TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013; and TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC.

The adopted repeal implements TWC, §37.002, which requires the commission to adopt rules to establish registration requirements for maintenance providers that will service and maintain on- site sewage disposal systems using aerobic treatment under THSC, §366.0515, and to impose administrative and criminal penalties under TWC, §§7.173 - 7.175.

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SUBCHAPTER G. OSSF ENFORCEMENT

30 TAC §285.70, §285.71

STATUTORY AUTHORITY

The amendments are adopted under the authority granted to the commission by the Texas Legislature in TWC, Chapter 37, and THSC, Chapter 366. The amendments are also adopted under the general authority granted in TWC, §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.102, which establishes the commission's authority necessary to carry out its jurisdiction; TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013; and TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC.

The adopted amendments implement TWC, §37.002, which requires the commission to adopt rules to establish registration requirements for maintenance providers that will service and maintain on-site sewage disposal systems using aerobic treatment under THSC, §366.0515, and to impose administrative and criminal penalties under TWC, §§7.173 - 7.175.

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SUBCHAPTER I. APPENDICES

30 TAC §285.90

STATUTORY AUTHORITY

The amendment is adopted under the authority granted to the commission by the Texas Legislature in TWC, Chapter 37, and THSC, Chapter 366. The amendment is also adopted under the general authority granted in TWC, §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.102, which establishes the commission's authority necessary to carry out its jurisdiction; TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013; and TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC.

The adopted amendment implements TWC, §37.002, which requires the commission to adopt rules to establish registration requirements for maintenance providers that will service and maintain on-site sewage disposal systems using aerobic treatment under THSC, §366.0515, and to impose administrative and criminal penalties under TWC, §§7.173 - 7.175.

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CHAPTER 311. WATERSHED PROTECTION
SUBCHAPTER H. REGULATION OF QUARRIES IN THE JOHN GRAVES SCENIC RIVERWAY

30 TAC §§311.71 - 311.82

The Texas Commission on Environmental Quality (commission) adopts new §§311.71 - 311.82. Sections 311.71, 311.72, 311.74, 311.76 - 311.78, 311.81, and 311.82 are adopted *with changes* to the proposed text as published in the March 24, 2006, issue of the *Texas Register* (31 TexReg 2411). Sections 311.73, 311.75, 311.79 and 311.80 are adopted *without changes* and the text will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Senate Bill (SB) 1354, 79th Legislature, 2005, amended Texas Water Code (TWC), Chapter 26 by adding new Subchapter M, Water Quality Protection Areas; specifically §§26.551 - 26.562. The statute addresses permitting, financial responsibility, inspections, water quality sampling, enforcement, cost recovery, and interagency cooperation with regard to quarry operations. The requirements of the statute are applicable to a pilot program in the John Graves Scenic Riverway. The John Graves Scenic Riverway (JGSR) is defined as the Brazos River Basin, and its contributing watershed, located downstream of the Morris Shepard Dam on the Possum Kingdom Reservoir in Palo Pinto County, Texas, and extending to the county line between Parker and Hood Counties, Texas.

Chapter 311, Subchapter H, implements §§26.551 - 26.554 and 26.562. New Subchapter H establishes the permitting and financial assurance requirements for the John Graves Scenic Riverway pilot program. A corresponding rulemaking is published in this issue of the *Texas Register* that includes the addition of Subchapter W, Financial Assurance for Quarries, to 30 TAC Chapter 37, Financial Assurance.

SECTION BY SECTION DISCUSSION

Adopted new §311.71, Definitions, defines the terms used within the subchapter. Definitions for the following terms are consistent with definitions found in SB 1354: aggregates, John Graves Scenic Riverway, operator, overburden, owner, pit, quarry, quarrying, and water body. The following definitions were added to, or modified from, those contained in SB 1354: 25-year, 24-hour rainfall event, aquifer, best management practices, natural hazard lands, navigable, reclamation, restoration, responsible party, structural controls, tertiary containment, and water quality protection area. Definitions for 25-year, 24-hour rainfall event, aquifer, best management practices, natural hazard lands, structural controls, and tertiary containment are generally consistent with other federal or state rules found in 40 Code of Federal Regulations and 30 TAC, respectively.

Adopted new §311.71(7) defines navigable, for the purposes of this subchapter, as "Designated by the United States Geological Survey (USGS) as perennial on the most recent topographic map(s) published by the USGS, at a scale of 1:24,000." Providing this definition eliminates much of the potential confusion regarding the term, given the significant variability in scope of other federal and state designations of navigability. This definition establishes the scope of permitting requirements most closely related to perennial water bodies, where impacts to water quality, aquatic life, and navigability are of concern, and allows the commission to focus permitting and enforcement resources in those areas. Additionally, the use of USGS topographic maps as the source for determining navigability provides an easily accessible source and eliminates the interpretation or case-by-case legal or factual analysis necessary to the use of the established definitions intended for the purpose of delineating property ownership.

Adopted new §311.71(14) includes definitions for reclamation and restoration, respectively.

The definition of refuse is deleted from the proposed text at §311.71(15) as the term is not used within the subchapter. Subsequent definitions are renumbered accordingly.

Adopted new §311.71(15) defines responsible party as "Any owner, operator, lessor, or lessee who is primarily responsible

for the overall function and operation of a quarry in the water quality protection area defined by §311.71(20)." This definition was modified from the definition found in SB 1354 so that it specifically references quarries located in a water quality protection area, as defined within the subchapter.

New §311.71(16) is adopted with changes to the proposed definition for restoration. The adopted text specifically identifies that restoration includes on- and off-site stabilization to reduce or eliminate an unauthorized discharge, or substantial threat of an unauthorized discharge from the permitted site.

Adopted new §311.71(20) defines a water quality protection area as "For the purposes of this subchapter, the Brazos River and its contributing watershed occurring in Palo Pinto and Parker Counties below the Morris Shepard Dam." SB 1354 requires the commission to designate water quality protection areas through commission rules. The definition of water quality protection area focuses permitting and enforcement resources within Palo Pinto and Parker Counties, where impacts from quarrying are of concern.

Adopted new §311.72, Applicability, identifies activities regulated by this subchapter and activities specifically excluded from regulation, consistent with SB 1354. Activities regulated by this subchapter include quarrying within a water quality protection area in the John Graves Scenic Riverway, as identified in subsection (a). Subsection (a) is adopted with changes so that it identifies the applicability of this subchapter as a pilot program with an expiration date of September 1, 2025. Activities specifically excluded from regulation are identified in subsection (b)(1) - (4). Paragraphs (1), (4), and (5) exclude, respectively, the following: the construction or operation of a municipal solid waste facility regardless of whether the facility includes a pit or quarry that is associated with past quarrying; an activity, facility, or operation regulated under Natural Resources Code, Chapter 134, Texas Surface Coal Mining and Reclamation Act; and quarries mining clay and shale for use in manufacturing structural clay products. Paragraphs (2) and (3) exclude, respectively, the following: a quarry, or associated processing plant, that on or before January 1, 1994, has been in regular operation without cessation of operation for more than 30 consecutive days and under the same ownership; and the construction or modification of associated equipment located on a quarry site or associated processing plant site identified in §311.72(b)(2). Where facilities are specifically excluded by paragraphs (2) and (3), the exclusion is applicable to operations within the current leasehold or property boundaries. Where these facilities acquire additional leaseholds or property, quarrying in those new areas will be subject to the requirements of this subchapter. Facilities subject to the exclusions provided in subsection (b)(2) and (3) are required to maintain documentation on site to demonstrate the exemption, as provided in subsection (c). Subsection (c) is adopted with changes to require all facilities subject to the exemptions within subsection (b) to maintain documentation on site to demonstrate exemptions. Subsection (c) lists the types of acceptable documentation in demonstrating exemptions. The responsible party carries the burden of proof in demonstrating that a quarry meets the exclusions listed in subsection (b).

In addition to the exclusion listed in new §311.72(b)(5), quarries mining clay and shale for use in manufacturing structural clay products are also excluded from regulation through the definition of aggregate and quarry in SB 1354 and this subchapter. This exclusion includes current operations, the expansion of current operations on current property, the expansion of current operations to adjacent properties, or new operations.

Adopted new §311.73, Prohibitions, identifies areas within a water quality protection area in the John Graves Scenic Riverway where quarrying is prohibited, consistent with SB 1354. Section 311.73(a) prohibits the construction or operation of any new quarry, or the expansion of an existing quarry, located within 200 feet of any water body, as defined by this subchapter. The construction or operation of any new quarry, or the expansion of an existing quarry, located between 200 feet and 1,500 feet of any water body is prohibited except where the requirements in §§311.75(2), 311.77, and 311.78(b) are met. For the purposes of this subchapter, a new quarry is any quarry that commenced operations after September 1, 2005. An existing quarry is any quarry that was in operation prior to September 1, 2005.

Throughout this subchapter, prohibitions, application requirements, and performance criteria are established based upon the quarry's location relative to a navigable water body (as defined in §311.71). Where location is established as the distance from a water body, the distance is measured from the gradient boundary. Federal Emergency Management Agency flood hazard maps identify the 100-year floodplain relative to a water body.

In addition to any other required permits, new §311.74, Authorization, requires all responsible parties to seek and obtain permit coverage under 30 TAC Chapters 205 or 305. Section 311.74(b)(1) identifies the requirements of this subchapter applicable to all quarries located within a water quality protection area in the John Graves Scenic Riverway. In addition to the requirements in paragraph (1), paragraph (2) requires individual permits for all quarries located within the 100-year floodplain or within one mile of a water body. The requirements of paragraph (3) are in addition to those found in paragraphs (1) and (2) for quarries located between 200 feet and 1,500 feet of a water body. These locational distinctions are consistent with SB 1354. Paragraphs (4) and (5) address facilities located within multiple applicability zones. The requirements for the more restrictive zone are applicable to the entire quarry, except where the executive director waives, modifies, or otherwise adjusts the requirements for that portion of the quarry located outside of the more restrictive applicability zone. The executive director anticipates waiving, modifying, or otherwise adjusting the requirements for that portion of the quarry located outside of the more restrictive applicability zone where a quarry can demonstrate that the portion of the facility located inside the more restrictive applicability zone will still meet all applicable performance requirements.

Adopted new §311.75, Permit Application Requirements, outlines the permit application requirements for all quarries located within a water quality protection area in the John Graves Scenic Riverway. Section 311.75(1) outlines the permit application requirements for all quarries located within a water quality protection area in the John Graves Scenic Riverway including requirements for the submission of financial assurance for restoration. Permit application requirements for quarries located between 200 feet and 1,500 feet of a water body within a water quality protection area in the John Graves Scenic Riverway are identified in paragraph (2). Paragraph (3) allows for the executive director to request any additional information necessary for the quarry to demonstrate compliance with TWC, Chapter 26, Subchapter M or this subchapter.

Adopted new §311.76, Restoration Plan, identifies the requirements for the Restoration Plan required in §311.75(1) for all quarries located within a water quality protection area in the John Graves Scenic Riverway. The Restoration Plan provides a proposed plan of action for how the responsible party will restore a water body to background conditions following an unauthorized discharge. Subsection (a)(1) and (2) outline the requirements included in the Restoration Plan enabling the executive director to evaluate the applicant's methodology for determining the physical, chemical, or biological background conditions of each of the water bodies that may be at risk as a result of an unauthorized discharge from a quarry. Since background conditions in a water body may change over time, paragraph (3) is designed to ensure that the determination of background conditions will be completed in a timely manner and reevaluated and updated periodically. Paragraph (4) allows the applicant to consider the unique characteristics of the facility, the receiving waters at risk, and the background conditions of these water bodies and requires the applicant to identify the specific goals and objectives of potential restoration actions based on site-specific qualities of the adjacent water bodies and the facility. Paragraph (5) requires the applicant to include an evaluation of a reasonable range of potential restoration alternatives that may be implemented to achieve the goals and objectives identified in the Restoration Plan to return affected water bodies to background conditions. It further requires that the applicant identify a preferred restoration alternative that would be implemented in the event of an unauthorized discharge. To ensure the effectiveness and long-term success of the restoration action, paragraph (6) requires the applicant to describe the process that will be used to monitor the effectiveness of the preferred restoration action and identify the performance criteria that will be used to determine the success of the restoration or the need for interim on- and off-site stabilization. To ensure meaningful input from stakeholders on the restoration action that is ultimately implemented to restore the affected water body, paragraph (7) requires the applicant to identify a process for public involvement in the evaluation of the restoration action(s) selected to restore the receiving water body to background conditions. Paragraph (8) requires a detailed estimate of the maximum probable costs required to complete a restoration action used to support the amount of financial assurance required by §311.81(a). Subsection (b) is adopted with changes to require certification, within the appropriate area or discipline, of the Restoration Plan, in whole or by component parts, by a licensed Texas professional engineer or a licensed Texas professional geoscientist.

Adopted new §311.77, Technical Demonstration, identifies the requirements for the Technical Demonstration required in §311.75(3) for all quarries located within 200 feet to 1,500 feet of a water body within a water quality protection area in the John Graves Scenic Riverway. Requirements for a time schedule for the proposed quarry from initiation to termination of operations, including restoration, are identified in subsection (a)(1). Subsection (a)(2) - (4) provides a description of the geology, quarrying processes, and other operations that would be found on site. Identification of the type, character, and volume of all wastewater and storm water generated at the quarry is required in paragraph (5). Paragraph (6) requires the submission of a topographic map and lists all items that must be identified on the map. Paragraph (7) defines the minimum requirements for the Surface Water Drainage and Accumulation Plan, required by SB 1354. Paragraph (7)(A) requires a description of the use and monitoring of structural controls and best management practices as identified in the Best Available Technology Evaluation. The minimum items required for identification on a topographic map are listed in subparagraph (B)(i) - (v). Paragraph (8) lists the requirements for the Best Available Technology Evaluation. Paragraph (8)(A) requires that the applicant assess the use of structural controls and best management practices. Certification by a licensed Texas professional engineer is required for the design and construction of all structural controls. Subparagraph (B) requires an evaluation of performance criteria established in §311.79 and §311.80. This evaluation should help ensure that the requirements of §311.79 and §311.80 have been reviewed and will be met by the applicant. Paragraph (9) ensures that the applicant has developed procedures and schedules for the periodic review of the Technical Demonstration for consistency with quarry operations and site conditions. Subsection (b) is adopted with changes to require certification, within the appropriate area or discipline, of the Technical Demonstration, in whole or by component parts, by a licensed Texas professional engineer or a licensed Texas professional geoscientist.

Adopted new §311.78, Reclamation Plan, identifies the requirements for the Reclamation Plan required in §311.75(3) for all quarries located within 200 feet to 1,500 feet of a water body within a water quality protection area in the John Graves Scenic Riverway. The minimum requirements of the Reclamation Plan are listed in subsection (a)(1)(A) - (C). Subparagraph (A) requires the applicant to provide a description of the proposed use of the disturbed area following reclamation. The proposed use of a reclaimed area will dictate the standards for reclamation, which subparagraph (B) requires the permittee to develop. Standards for reclamation must address removal or final stabilization of all materials, waste, structures, temporary roads/railroads, and equipment; backfilling, regrading, and recontouring; slope stabilization; and the establishment of vegetation, wildlife habitat, drainage patterns, and permanent control structures, as listed in paragraph (1)(B)(i) - (xi). Paragraph (1)(B)(viii) is adopted with changes to remove references to the creation of habitat for endangered/threatened species, as the suggestion in creating habitat for endangered/threatened species has other potential regulatory implications. A description of how reclamation will be conducted and a timetable for the completion of reclamation activities is required in the Reclamation Plan in subparagraph (C). Paragraph (2) requires a detailed estimate of the maximum probable costs required to complete reclamation. Subsection (b) is adopted with changes to require certification, within the appropriate area or discipline, of the Reclamation Plan, in whole or by component parts, by a licensed Texas professional engineer or a licensed Texas professional geoscientist.

Adopted new §311.79, Performance Criteria for Quarries Located Within a Water Quality Protection Area in the John Graves Scenic Riverway, outlines the performance criteria applicable to all quarries located within a water quality protection area in the John Graves Scenic Riverway. Section 311.79(1) establishes a 45 milligrams per liter daily average effluent limitation for total suspended solids and a pH range of 6.0 to 9.0 standard units for all discharges to waters in the state. Effluent limitations for total suspended solids are established to reduce sediment loading to receiving water bodies. A daily average concentration of 45 milligrams per liter is achievable when proper best management practices and structural controls are installed and maintained. Effluent limitations for pH are established to preclude impacts to water quality and are achievable primarily through best management practices, although structural controls or treatment may be necessary. The applicability of total suspended solids and pH effluent limitations are limited in paragraph (2) to discharges re-

sulting from a rainfall event less than the 25-year, 24-hour rainfall event. The 25-year, 24-hour rainfall event has historically been the design standard for water quality applications. Rainfall events beyond the 25-year, 24-hour rainfall event are typically considered an "act of God." To ensure that the effluent limitations established in paragraphs (1) and (2) are monitored consistently, monitoring frequencies are specified in paragraph (3) at once per day, when discharging. This monitoring schedule provides regular monitoring of discharges, allowing the commission and quarries to monitor the effectiveness of best management practices and structural controls. Paragraph (4) outlines monitoring and reporting requirements for monitoring conducted under paragraph (3). Because paragraph (2) limits the applicability of effluent limitations under severe rainfall conditions, paragraph (5) requires that the permittee install a permanent rain gauge and keep daily records of rainfall and resulting flow.

Adopted new §311.80, Additional Performance Criteria for Quarries Located Between 200 Feet and 1,500 Feet of a Water Body Located Within a Water Quality Protection Area in the John Graves Scenic Riverway, outlines additional performance criteria applicable to all quarries located between 200 feet and 1,500 feet of a water body within a water quality protection area in the John Graves Scenic Riverway. Section 311.80(1)(A) - (F) addresses design and construction requirements for final control structures including: certification of the design and construction, availability of design and construction plans and specifications, slope restrictions, water management capabilities, stabilization, inspection, and buffers. These requirements are established to ensure proper design and construction, operation, and maintenance of structural controls. Paragraph (2) provides for the proper operation of treatment, detention, and water storage tanks and ponds by requiring a minimum of two feet of freeboard. Paragraph (3) requires a depth marker so that compliance with paragraph (2) can be verified. Impacts to historical resources are addressed in paragraph (4) by requiring compliance with 36 Code of Federal Regulations Part 800 and 9 Texas Natural Resources Code, Chapter 191. Paragraph (5) addresses impacts to federal endangered/threatened, aquatic/aquatic-dependant species/proposed species or their critical habitat. As a measure of protection for water supply wells, paragraph (6) establishes siting restrictions for all waste management units. Paragraph (7) establishes requirements for secondary and tertiary containment of chemicals and fuels to reduce the potential for leaks and spills to contaminate surface or groundwater. Tertiary containment is required where quarry operations overlay aquifer or aquifer recharge areas and sufficient confining layers do not exist to preclude contamination. Secondary containment is required in all instances. Where natural hazards, frequent flooding, or areas of unstable geology exist, paragraph (8) prohibits the location of a quarry operation.

Adopted new §311.81, Financial Responsibility for Quarries Located Within a Water Quality Protection Area in the John Graves Scenic Riverway, establishes requirements for financial assurance for restoration and reclamation as required by this subchapter.

Adopted new §311.81(a) requires that the owner or operator of a quarry located in the John Graves Scenic Riverway establish and maintain financial assurance, in an amount determined by the cost estimate within the approved Restoration Plan in §311.76(a)(8), for restoration of a water body that is affected by an unauthorized discharge. The financial assurance is intended to cover the costs of site stabilization and restoration performed by an independent contractor and include design and engineering fees, costs of repairing failed or impaired structural controls, costs of soil stabilization and erosion control measures necessary to prevent additional releases, and where practicable, removal of excess silt, sediment, rocks, and debris from the affected water body.

Adopted new §311.81(b) requires that the owner or operator of a quarry located in the John Graves Scenic Riverway establish and maintain financial assurance, in an amount determined by the cost estimate within the Reclamation Plan in §311.78(a)(2), for reclamation of the quarry. The financial assurance is intended to cover the costs of reclamation performed by an independent contractor. Costs of reclamation include design and engineering fees; removal or final stabilization of all materials, waste, structures, temporary roads/railroads, and equipment; backfilling, regrading, and recontouring; slope stabilization; and the establishment of vegetation, wildlife habitat, drainage patterns, and permanent control structures.

New §311.82, Existing Quarries, is adopted with changes. In response to public comments on the proposed rules, the commission added language to this section that addresses operational provisions and permit application deadlines for existing quarries. Subsection (a) provides for existing quarries located outside the 100-year floodplain and greater than one mile from a water body to continue operating under the terms of an existing Texas Pollutant Discharge Elimination System Permit or Texas Land Application Permit, provided that the quarry maintains compliance with that permit and submits an application for a general permit issued under Subchapter H as specified in that permit. Subsection (b) provides for existing quarries located greater than 1,500 feet from a water body to continue operating under the terms of an existing Texas Pollutant Discharge Elimination System Permit or Texas Land Application Permit, provided that the quarry maintains compliance with that permit and submits an application for an individual permit within 180 days of the effective date of the adopted rules. Subsection (c) specifies that quarries located within 200 feet to 1,500 feet of a water body may not operate until the commission issues the quarry a permit under the requirements of this subchapter and requires that these facilities submit and individual permit application within 180 days of the effective date of the adopted rules. In response to separate public comment, the text citing the expiration date of this subchapter proposed at §311.82, was moved to §311.72, Applicability.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because, although the adopted rulemaking meets the definition of a "major environmental rule" as defined in §2001.0225, it does not meet any of the four applicability requirements listed in §2001.0225(a). Texas Government Code, §2001.0225(a), only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the adopted rules do not meet any of these four applicability requirements. First, regardless of whether the rules exceed a standard set by federal law, the adopted rules are

specifically required to implement state law in SB 1354. Second, the adopted rules do not exceed a requirement of state law, in that they are being adopted to implement specific requirements of SB 1354. Third, the adopted rules do not exceed an express requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Fourth, the commission does not adopt these rules solely under the general powers of the agency, but rather under the authority of SB 1354, which directs the commission to implement rules under TWC, Chapter 26.

The commission solicited public comment on the draft regulatory impact analysis in the March 24, 2006, issue of the *Texas Register* (31 TexReg 2411). No comments were received on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted rules and prepared an assessment of whether the adopted rules constitute a takings under Texas Government Code, Chapter 2007.

The specific purpose of the adopted rules is to implement SB 1354. The adopted rules protect a unique portion of the Brazos River watershed between Possum Kingdom Reservoir in Palo Pinto County and Parker County, Texas, to be known as the John Graves Scenic Riverway, from ongoing mining and quarrying activities in the proximity of the beds, bottoms, and banks of the river that significantly impair the quality of the water flowing in the river.

These adopted rules implement the requirements for quarries in the John Graves Scenic Riverway that were established in SB 1354. Under SB 1354, the commission may not authorize a quarry within 200 feet of a navigable water body within the John Graves Scenic Riverway. The bill prohibits the commission from authorizing the construction or operation of a new quarry or the expansion of an existing quarry between 200 and 1,500 feet of a navigable waterbody within the John Graves Scenic Riverway, unless certain performance criteria established by rulemaking are satisfied. SB 1354 further establishes that a quarry located or proposed to be located within one mile of a navigable waterbody in the John Graves Scenic Riverway must get an individual permit. Those quarries located or proposed to be located at a distance more than one mile must be covered under a general permit. This adopted rulemaking and related restrictions implement the express requirements of SB 1354.

Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property, because although the adopted rules do affect private real property, they do not constitute a "taking" as defined by the Private Real Property Rights Preservation Act. According to the Act, "taking" means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Texas Constitution, Article I, §17 or §19; or a governmental action that: 1) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and 2) is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property is determined as if the governmental action is in effect.

The Fifth Amendment to the United States Constitution states in relevant part: "Nor shall private property be taken for public use, without just compensation." The takings clause applies to the states by virtue of the Fourteenth Amendment. Similarly, Texas Constitution, Article I, §17 provides: "No person's property shall be taken, damaged or destroyed without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money . . .."

Texas courts have held that takings can be classified as either physical or regulatory. Physical takings occur when the government authorizes an unwarranted physical occupation of an individual's property. The adopted rules do not authorize the physical occupation of any private real property; therefore, they will not result in a physical takings of private real property. A regulatory takings occurs when a regulation does not substantially advance legitimate state interests, or when a regulation either denies a landowner all economically viable use of property, or unreasonably interferes with a landowner's right to use and enjoy that property.

The adopted rules substantially advance a legitimate state interest by implementing SB 1354, relating to the protection of water quality in watersheds threatened by quarry activities; establishing a pilot program in a certain portion of the Brazos River watershed; and providing penalties. The commission is tasked with maintaining the quality of water in the state consistent with the public health and enjoyment, and the propagation and protection of terrestrial and aquatic life. SB 1354 is being implemented to protect the John Graves Scenic Riverway from ongoing mining and quarrying activities in the proximity of the beds, bottoms, and banks of the river that significantly impair the quality of the water flowing in the river.

Determining whether all economically viable use of a property would be denied entails an analysis of whether value remains in property subject to these rules if the rules were adopted. The adopted rules do not prohibit quarrying altogether. While the adopted rules would prohibit quarrying within 200 feet of a navigable water body within the John Graves Scenic Riverway, quarrying would be permitted between 200 feet and 1,500 feet of a water body, provided that certain performance criteria are met. Facilities located more than one mile from a water body may obtain a general permit under TWC, §26.040. In addition, the adopted rules do not restrict other potential uses of property located in the John Graves Scenic Riverway. Therefore, the adopted rules would not deny any landowner all economically viable uses of a property.

Determining whether the adopted rules would unreasonably interfere with a landowner's right to use and enjoy property would require consideration of two factors: 1) the economic impact of the regulation; and 2) the extent to which the adopted rules interfere with distinct investment-backed expectations. This determination is typically made by courts on a fact-intensive, case-by-case basis.

As previously stated, the adopted rules do not prohibit quarrying altogether; instead, the rules restrict quarrying activities that will protect the quality of the water flowing in the John Graves Scenic Riverway. The commission does not anticipate that the adopted rules will unreasonably interfere with a landowner's investment-

backed expectations, nor will the adopted rules be the producing cause of a 25% reduction in the market value of affected private real property.

The commission solicited public comment on the takings impact assessment in the March 24, 2006, issue of the *Texas Register* (31 TexReg 2411). No comments were received on the takings impact assessment.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

PUBLIC COMMENT

The public comment period ended on April 24, 2006, at 5:00 p.m. A public hearing on the proposed rules was held in Mineral Wells on April 6, 2006, at 6:30 p.m. at the Mineral Wells City Hall Annex, Council Chambers, 115 Southwest First Street, Mineral Wells, Texas. Oral comments were received from the Brazos River Conservation Coalition (BRCC). Written comments were received from the BRCC; Hilgers Bell & Richards (Hilgers Bell); Jackson, Sjoberg, McCarthy & Wilson, L.L.P. (McCarthy), on behalf of multiple parties including one individual, the Rocking "W" Ranch, and the BRCC; Harris County Precinct 4 Parks (Harris County); Lloyd Gosselink Blevins Rochelle & Townsend, P.C. (Lloyd Gosselink), on behalf of Southwestern Brick Institute; GEOS Consulting (GEOS); Texas Aggregates and Concrete Association (TACA); the Texas Board of Professional Geoscientists (TBPG); Texas Industries, Inc. (TXI); Vulcan Materials Company (Vulcan); Westward Environmental, Inc. (Westward); and 430 individuals. The comments generally concerned technical issues.

RESPONSE TO COMMENTS

Definitions - Miscellaneous

TXI commented that the definition for "natural hazard lands" found at §311.71(6) should be deleted as the definition is not in SB 1354 and does not further the intent of the legislation.

TWC, §26.553(d)(1)(D) specifies that additional performance criteria established by the commission rule and incorporated into the permit address "whether operations could affect natural hazard lands . . .." These additional performance criteria are established in the proposed rules at §311.80(8). As a result, the commission finds the supporting definition of natural hazard lands at §311.71(6) necessary, and has retained that definition in the adopted rule text.

TXI commented that the definition for refuse at §311.71(15) should be deleted.

The commission agrees that the term "refuse" should be deleted as the term is not used within this subchapter. The definition has been removed from the adopted text and subsequent definitions have been renumbered accordingly.

In order to more clearly limit the definition for responsible party found at §311.71(16), TXI offered the following: "Any owner, operator, lessor, or lessee who is primarily responsible for overall function and operation of quarry located in the water quality protection area as defined in this section subject to this rule."

The commission disagrees with adding the language "subject to this rule" to the definition of responsible party. Section 311.71 states that "the following words and terms, when used in the following subchapter, have the following meanings." This language makes it clear that these definitions are for this subchapter only, so the suggested language by TXI is unnecessary.

TXI commented that the definition for structural controls at §311.71(17) should be deleted, as the term is not defined in SB 1354.

The commission disagrees with removing the definition of structural controls from the subchapter and has retained the definition in the adopted rule text. The definition of structural controls is included in the proposed rules at §311.71(17) to clarify provisions at §311.77(a)(7)(A) and (B)(iv) and (8)(A) and (C), all of which reference structural controls. The provisions proposed at §311.77(a)(7)(A) and (B)(iv) and (8)(A) and (C) are part of the Technical Demonstration that supports the commission finding that additional performance criteria will be met for those quarries authorized to operate within 200 to 1,500 feet of a water body located within a water quality protection area in the John Graves Scenic Riverway.

Definitions - Navigable and Waterbody

The BRCC and McCarthy commented on the proposed definition of navigable at §311.71(7) and the subsequent definition of water body at §311.71(19). The BRCC and McCarthy stated that the proposed definition of navigable is inconsistent with, and a more narrow interpretation of, navigable at law than that found at Texas Natural Resource Code, §21.003(3). Additionally, the BRCC and McCarthy asserted that the definition of navigable, as proposed, does not conform with a "navigable in fact" interpretation of navigability either. BRCC and McCarthy noted the potential for intermittent streams to impact downstream perennial streams and stated that the proposed definition of navigable fails to regulate such intermittent streams. Specifically, the BRCC noted that Grindstone Creek, Turkey Creek, and Rock Creek do not appear to be included within the definitions of navigable and water body.

Westward suggested that the commission designate affected water bodies rather than relying upon the definition of navigable. TXI suggested the following definition for water body: "the area defined by the river and its next order contributing drainage area."

The objective in establishing a definition of a navigable water body within the John Graves Scenic Riverway was to define the regulatory requirements of SB 1354 in a way that was predictable and readily understandable, by the commission, consultants, applicants, and the public. The commission agrees that the proposed definition of "navigable," and the related term of "water body," are not the same as the definition of "navigable stream" under Texas Natural Resources Code, §21.001(3). In Texas, a stream is navigable if it is navigable in fact or navigable by law. The existing definition under the Natural Resources Code exists for the purpose of determining land ownership and the separation of the public domain from private property and does not have a specific basis in hydrology. The commission recognizes the potential benefit in establishing the scope of the rules consistent with the definition of public land and the public domain of streams that are either navigable in fact or navigable by law. However, using the statutory definition in the Natural Resources Code, as

opposed to the definition in this subchapter, is a less practical solution to effectively administer the regulatory program authorized under SB 1354.

While current law provides an existing definition of navigability in a different context, applying that definition to this subchapter raises some concerns because questions of law and fact can lead to uncertainty in the administration of these regulations. Ultimately, the question of whether a stream is navigable under the existing statutory definition in the Texas Natural Resources Code, as recommended in the comments, creates an issue that would need to be determined on a case-by-case basis and potentially require resolution in court, if disputed. It is that uncertainty, and the desire to be able to clearly apply this subchapter, that prompted the commission to propose the use of the USGS designation of perennial streams as a basis for determination.

The commission disagrees with the representation that the definition of navigability within this subchapter will result in some stream segments going unregulated or that the definition will not allow the regulation of quarries or intermittent streams. Under SB 1354 and this subchapter, all quarries and all streams within the designated water quality protection area not expressly exempted by law will be subject to regulation and permitting. Facilities located adjacent to water courses that are non-navigable will be required to obtain authorization under a general permit. The general permit will include performance criteria and require restoration plans and financial assurance. The performance criteria established by this subchapter are intended to control discharges from quarries located anywhere within the designated water quality protection area, including those located, or to be located, adjacent to intermittent streams.

The commission notes that some water courses may not have been accurately represented in maps that were displayed at public hearings on the proposed rules and prepared to show the extent of the water quality protection area. Of the streams specifically referenced by the comments, Grindstone Creek may contain reaches designated as perennial and defined as a water body under this subchapter. The maps were intended to be a general description of the designated water quality protection area and not an official map. It is the responsibility of an applicant to demonstrate compliance with any requirements that are based on designation of a water body under this subchapter.

No changes to the rules, as proposed, are made in response to these comments. Likewise, no changes are made in response to recommendations that the commission designate affected water bodies rather than rely on a definition of navigability or water bodies be defined as the Brazos River and the next order of streams in the contributing drainage area. Either approach to designating water bodies without some technical or factual basis and without further statutory guidance is inconsistent with the authority provided in SB 1354 and arbitrary.

Applicability

TACA and Lloyd Gosselink requested that the proposed rules identify the subchapter as applying to a pilot program regulating quarrying within a water quality protection area in the John Graves Scenic Riverway. Lloyd Gosselink specifically requests that this text be added at §311.72(a).

The commission has modified the text at §311.72(a) to read: "This subchapter applies to a pilot program regulating quarrying within the water quality protection area designated by this subchapter, in the John Graves Scenic Riverway. This subchapter expires on September 1, 2025." This modification does not effect a change in the applicability or expiration of this subchapter, but clarifies the application of these rules as a pilot program expiring September 1, 2025, consistent with TWC, §26.552.

The BRCC and McCarthy requested that quarries excluded from regulation under Subchapter H, at §311.72(b)(1), (4), and (5) maintain documentation onsite of their exemption.

The commission agrees with this comment and has revised §311.72(c) to require facilities subject to the exclusions under §311.72(b)(1), (4), and (5) to maintain documentation onsite of their exemption. This documentation includes, but is not limited to: any permit issued by the commission, Railroad Commission of Texas, or the United States Environmental Protection Agency.

TACA commented that the term "cessation of operation," as used at §311.72(b)(2) and (c)(2) be clarified to mean "cessation of production, sales, or operations altogether for a period of 30 days or more."

The commission declines to expand upon "cessation of operation." TWC, §26.552(c)(1) states this subchapter does not apply to a quarry or associated processing plant that since or before January 1, 1994, has been in regular operation in the John Graves Scenic Riverway without cessation of operation for more than 30 consecutive days and under the same ownership. TWC, §26.552(c)(1) provides sufficient clarity. The commission chooses to follow the explicit language of the TWC and not expand on the term "cessation of operation."

TXI requested that §311.72(b)(2) be revised to read as follows: "A quarry, its owned or leased land, or associated processing plant, that since on or before January 1, 1994, has been in regular operation without cessation of operation for more than 30 consecutive days and under the same ownership or control." TXI further requested that §311.72(c)(1) be revised to read as follows: "Documentation demonstrating ownership control includes, but is not limited to: deeds, property tax receipts, leases, or insurance records."

The commission declines to add the word "control" to the text in §311.72(b)(2) and (c)(1). TWC, §26.552(c)(1) states this subchapter does not apply to a quarry or associated processing plant that since or before January 1, 1994, has been in regular operation in the John Graves Scenic Riverway without cessation of operation for more than 30 consecutive days and under the same ownership. Section 26.552(c)(1) makes no mention of control, but says ownership. Also, the definition of owner in §26.551(5) does not mention control. Since neither the definition of owner nor the exclusion mention "control," the commission declines to add it to §311.72(b)(2) and (c)(1).

Westward commented that the exclusions available at §311.72(b)(2) and (3) should apply to additional leases or property further from the river than existing operations as they have a lower potential to impact the Brazos River.

Any expansion of an existing quarry located within a water quality protection area in the John Graves Scenic Riverway beyond current leaseholds or property boundaries will require a permit under this subchapter. The commission disagrees that the exclusions at §311.72(b)(2) and (3) should apply to subsequent leaseholds or properties. The commission limited these exclusions to current leaseholds/property boundaries, consistent with the commission's understanding of legislative intent.

Westward commented that the requirement for demonstrating continuous operation without cessation of operation for more

than 30 consecutive days beginning on or before January 1, 1994, at §311.72(b)(2) is excessive.

The commission recognizes that §311.72(b)(2) requires excluded facilities to document continuous ownership over an extended period of time. However, this documentation is necessary to prove a readily available, definitive interpretation on the applicability of this subchapter.

Westward commented that financial assurance should not be required for small operations that mine on private property for the landowner, where the property itself is not within the distance limits of this bill but are in the listed counties; specifically, those that do not affect the John Graves Scenic Riverway.

The commission disagrees with this comment. If a quarry is located in the water quality protection area defined in §311.71, then that quarry will have to maintain financial assurance if the quarry is producing aggregates for commercial sale. The type of financial assurance required depends on the location of the quarry in relation to a designated water body.

Prohibitions

The BRCC comments on the expansion of existing quarries, as discussed in §311.73. Specifically, the BRCC has questioned the preamble discussion regarding expansion, and whether defining expansion as "any change to an existing quarry that results in additional disturbance" is appropriate.

The commission disagrees with this comment. The language regarding an additional disturbance does not appear within the rule itself but in the preamble's SECTION BY SECTION DISCUSSION. It is the commission's understanding that SB 1354 precluded quarry operations within 200 feet of a water body. Any operations at an existing quarry will result in an additional disturbance; therefore, existing quarries may not continue to operate within 200 feet.

Authorization

TXI suggested the following text at §311.74(a): "Any responsible party shall obtain a permit subject to the requirements of Chapters 205 and 305 of this title, if applicable."

The commission designated the applicability of the subchapter at §311.72 and has, therefore, determined the addition of "if applicable" at §311.74(a) is not necessary.

TXI noted that the provision at §311.74(b)(2), relating to the application requirements for quarries located within a water quality protection area in the John Graves Scenic Riverway, has potential adverse effects on future aggregate operators outside the John Graves Scenic Riverway.

The commission disagrees with this comment. The provision found at §311.74(b)(2) specifically states that these requirements are "for discharges from quarries located within a water quality protection area in the John Graves Scenic Riverway." As written, the provision clearly limits that applicability of this subchapter and will not apply to other facilities or quarries located outside a water quality protection area in the John Graves Scenic Riverway.

Vulcan commented on the requirements for quarries located within multiple applicability zones found at §311.74(b)(4) and (5). Specifically, Vulcan suggested that the commission develop specific criteria for waiving, modifying, or otherwise adjusting the requirements for that portion of the quarry outside the more restrictive applicability zone.

The commission anticipates waiving, modifying, or otherwise adjusting the requirements for that portion of the quarry outside the more restrictive applicability zone where a quarry can demonstrate that the portion of the facility located inside the more restrictive applicability zone will still meet all applicable performance requirements under this subchapter. Action by the commission in this regard will be on a case-by-case basis and determined by site-specific factors. As such, the commission may not anticipate all circumstances under which such action would or would not be appropriate, and declines to do so by establishing criteria.

Restoration and the Restoration Plan

Westward commented that there should not be public involvement in the restoration process as it is detrimental to restoration projects.

The commission has provided for public involvement in the restoration process at §311.76(a)(7) as a way to access the historical knowledge of the local public and ensure transparency of the restoration process to the general public. For these reasons, the commission has retained the text at §311.76(a)(7) without changes at adoption.

The BRCC and McCarthy commented that the definition of restoration at §311.71(16) does not clearly include restoration of the quarried or excavated area, but focuses on the receiving water body. The BRCC and McCarthy proposed the following definition for restoration: "Those actions necessary to change the physical, chemical, or biological qualities of a receiving water body in order to return the water body to its background condition. Restoration includes on- and off-site stabilization to reduce or eliminate an unauthorized discharge, or substantial threat of an unauthorized discharge, from the permitted site."

The commission agrees that modifying the definition of restoration to include "from the permitted site" at the end of the last sentence improves the rule. The commission has made this change at adoption by adding "from the permitted site" at the end of the last sentence at §311.71(16).

TXI commented that the last sentence in the definition of restoration at §311.71(16) is too broad and should be deleted.

The definition of restoration has been modified at adoption, as discussed previously, to read: "Those actions necessary to change the physical, chemical, an/or biological qualities of a receiving water body in order to return the water body to its background condition. Restoration includes on- and off- site stabilization to reduce or eliminate an unauthorized discharge, or substantial threat of an unauthorized discharge, from the permitted site." This definition specifically identifies those items considered within the context of restoration within the subchapter, while still allowing consideration of site-specific factors. The commission declines to further modify or delete this definition.

TXI commented that the requirements for a Restoration Plan found at §311.75(1)(A) and §311.76 are overly prescriptive and inconsistent with legislative intent.

TWC, §26.553(f)(1) requires a responsible party for a quarry located in a water quality protection area to submit a permit application including: "a proposed plan of action for how the responsible party will restore the receiving water body to background condition in the event of an unauthorized discharge that affects the water body . . .." The commission maintains that the provisions of the Restoration Plan found at §311.75(1)(A) and §311.76

are consistent with legislative intent in listing the minimum components of the Restoration Plan.

Westward commented that approval of the Restoration Plan by the commission should not be required. The commission should only require submission and implementation of the Restoration Plan.

The commission disagrees with this comment. TWC, §26.553(f) requires a quarry to submit a Restoration Plan and provide financial assurance for restoration. The commission has determined that approval of the Restoration Plan is necessary in determining that the Restoration Plan meets the minimum requirements listed at §311.76 and in determining that the quarry has provided the appropriate amount of financial assurance for restoration.

Technical Demonstration

TXI commented that the requirements for a Technical Demonstration at §311.75(2)(A) and §311.77 are overly prescriptive and inconsistent with legislative intent.

The commission disagrees with this comment. TWC, §26.553 prohibits the construction or operation of any new quarry, or the expansion of an existing quarry, located within 1,500 feet of a water body located within a water quality protection area. The statute then creates an exception to this prohibition for quarries located 200 feet and 1,500 feet away, subject to the commission finding that additional performance criteria are met. In order to determine that the applicant has implemented the proper structural controls and best management practices necessary to reasonably meet the additional performance criteria, the commission established additional application requirements in the Technical Demonstration. The Technical Demonstration incorporates a plan for surface water drainage and water accumulation and a best available technology evaluation required by the statute at TWC, §26.553(d)(2) and (3). As the TWC requires a finding that will be supported by the Technical Demonstration, the commission maintains that the requirements at §311.77 are minimally prescriptive and consistent with legislative intent.

TXI commented that the Best Available Technology Demonstration at §311.77(a)(8) is inconsistent with legislative intent.

The commission disagrees with this comment. TWC, §26.553 provides an exclusion to the operational prohibition for quarries located within 200 feet to 1,500 feet of a water body located within a water quality protection area, subject to the commission finding that the quarry has provided "evidence that, to the extent possible, quarrying will be conducted using the best available technology to . . ." {TWC, §26.553(d)(4)}. The Best Available Technology Demonstration provides a review of existing technologies and selection of the best available technology, consistent with TWC, §26.553(d)(4).

TXI recommends that the requirements found in the Technical Demonstration at §311.77(a)(2) - (5) require general rather than specific descriptions of the type of quarrying, material deposit, other operations, and wastewater.

The commission determined it necessary to provide detailed descriptions of the type of quarrying, material deposit, other operations, and wastewater for the commission to find that the quarry will meet additional performance criteria established at §311.80 and issue a permit for a quarry to operate within 200 to 1,500 feet of a water body. The adopted text retains the requirement for specific descriptions of the type of quarrying, material deposit, other operations, and wastewater.

TXI states that information regarding the material deposit, required at §311.77(a)(3), including the type, geographical extent, depth, and volume in addition to a description of the general area geology is proprietary information and should be struck from the rule.

The commission disagrees with this comment and the text remains at adoption. The information required at §311.77(a)(3) can be found within publically available literature and, as such, is not proprietary in nature.

TXI commented that the Surface Water Drainage and Water Accumulation Plan found at §311.77(a)(7) is overly prescriptive for quarries and adds cost for minimum benefit.

TWC, §26.553 provides an exclusion to the operational prohibition for quarries located within 200 feet to 1,500 feet of a water body located within a water quality protection area, subject to the commission finding that the quarry has "provided a plan for the control of surface water drainage and water accumulation. . ." {TWC, §26.553(d)(2)}. Consistent with the intent of controlling surface water drainage and water accumulation, the provisions at §311.77(a)(7) require the quarry to identify the structural controls and best management practices designed to control surface water drainage and water accumulation and identify on a topographic map those structural controls and best management practices. Additionally, the topographic map must identify physical features that influence storm water. The commission determined these to be the minimum requirements necessary for the commission to find that the quarry has provided an adequate plan for the control of surface water drainage and water accumulation and issue a permit for a quarry to operate within 200 feet to 1,500 feet of a water body located within a water quality protection area in the John Graves Scenic Riverway.

Reclamation and the Reclamation Plan

TXI offered the following definition for reclamation at §311.71(14): "The land treatment processes using best management practices to minimize degradation of water quality and return the land to a beneficial use."

The definition for reclamation proposed by TXI does not identify the components of reclamation incorporated into the Reclamation Plan. The definition for reclamation proposed by the commission is retained at adoption, without changes, as it is a better representation of reclamation as characterized in this subchapter.

TXI comments that the definition of reclamation found at §311.71(14) and requirements for, and specific provisions of, the Reclamation Plan found at §311.78(a)(1)(B)(i) and (a)(2) are inconsistent with the legislative intent of SB 1354. Westward states that the commission should require submission and implementation of the Reclamation Plan only, as opposed to requiring approval by the commission.

The commission disagrees with this comment. TWC, §26.553 provides an exclusion to the operational prohibition for quarries located within 200 feet to 1,500 feet of a water body located within a water quality protection area, subject to the commission finding that the quarry will meet additional performance criteria established by commission rule that address: "a plan for reclamation of the quarry that is consistent with best management standards and adopted by the commission for quarry reclamation, which may include backfilling, soil stabilization, and compacting, grading erosion control measures, and appropriate revegetation" {TWC, §26.553(d)(3)}. The definition for reclama-

tion, application requirements for submitting a Reclamation Plan, and specific provisions within the Reclamation Plan are included so that the commission is able to make a finding as required by TWC, §26.553(d)(3). In making a finding as required by TWC, §26.553(d)(3), the commission will be providing approval of the Reclamation Plan.

TXI commented that the definition of reclamation at §311.71(14), the requirements for submitting a Reclamation Plan at §311.78(a)(1)(A), and the specific provisions of the Reclamation Plan at §311.78(a)(1)(B)(iii) - (ix) are restrictive of landowners' rights.

The commission disagrees with this comment and the provisions at §311.71(14), and §311.78(a)(1)(A) and (B)(iii) - (ix) are retained without changes in the adopted text. The Reclamation Plan requires a quarry to establish procedures and standards for reclamation based upon the final use of the quarried area. The commission purposefully constructed the Reclamation Plan in such a way as to allow the quarry to designate the final land use and the procedures and standards necessary to achieve that land use. In doing so, the commission intended to provide for a multitude of acceptable final land uses and preserving the rights of private landowners in establishing that final land use.

Vulcan commented on the requirement within the Reclamation Plan at §311.78(a)(1)(B)(viii) for the establishment of wildlife habitat, giving consideration to creation/expansion of habitat for endangered and threatened species, where applicable. Specifically, Vulcan states that SB 1354 provides protection for endangered species from expansion, but does not refer to creating habitat. Vulcan recommends that regulation of endangered and threatened species be limited to current regulations.

The commission intended to encourage, not mandate, the creation or expansion of habitat for endangered/threatened species, where appropriate. After reviewing this comment, the commission acknowledges that the reference to endangered species within this context could have other unintended regulatory implications and, as a result, has removed the reference to the creation of endangered/threatened species habitat in the adopted rules.

Performance Criteria

TXI comments that the provisions established as performance criteria at §311.79 should be covered under Chapters 205 and 305 and under a general permit for aggregate facilities.

Chapters 205 and 305 contain effluent limitations and other permit requirements applicable to discharges into and adjacent to waters in the state. The performance criteria established at §311.79 are a more specific application of effluent limits and permit requirements designed to address the potential impacts of discharges to waters into and adjacent to waters in the state from quarries located within a water quality protection area in the John Graves Scenic Riverway. The commission disagrees that the requirements at §311.79 are addressed under Chapters 205 and 305 and has retained §311.79 without changes at adoption.

In accordance with the requirements at TWC, §26.553(b), the commission is developing a general permit that will provide authorization under this subchapter to quarries located outside the 100-year floodplain and greater than one mile from a water body located within a water quality protection area in the John Graves Scenic Riverway. This general permit will incorporate the performance criteria established at §311.79, in addition to any effluent limitations and permit requirements established by another chapter within this title. Quarries within the 100-year floodplain or one mile of a water body will be regulated under an individual permit, consistent with TWC, §26.553(a).

TXI recommended that the monitoring frequencies established for flow, total suspended solids, and pH at §311.79(3) should be once per month, when discharging.

The commission disagrees with this comment. Once per day, when discharging, monitoring frequencies for flow, total suspended solids, and pH is retained in the rule at adoption. Monitoring frequencies for flow and pH are established consistent with 30 TAC §319.9(b). Concerns regarding erosion and sedimentation in the John Graves Scenic Riverway prompted the passage of SB 1354. Total suspended solids is the primary parameter of concern in the discharge from quarries; therefore, the commission established once per day, when discharging, monitoring of this parameter as opposed to once per week as listed at §319.9(b).

Additional Performance Criteria

TXI commented that quarry operators should determine the best way to protect water quality, consistent with legislative intent. The performance criteria established for protecting water quality should identify goals as opposed to the prescriptive requirements found at §311.80. TXI further states that enforcement should be based on failure to meet those goals.

TWC, §26.553 provides an exclusion to the operational prohibition for quarries located within 200 feet to 1,500 feet of a water body located within a water quality protection area, subject to the commission finding that additional performance criteria, as established by commission rule, are met. The commission has established additional performance criteria at §311.80, providing the commission authority to issue permits for quarries within 200 feet to 1,500 feet from a water body, consistent with the requirements of TWC, §26.553 and legislative intent. Although the subchapter defines additional performance criteria, §311.77(a)(8) provides for quarries to determine those structural controls and best management practices that constitute best available technology for their facility and achieve the specific performance criteria at §311.80.

TXI recommends that the final control structure side slopes must not exceed a gradient of 3:1, rather than the 1:3 proposed in the rules at §311.80(1)(B).

The commission disagrees with this comment. The commission has established this additional performance criterion at §311.80(1)(B) which stipulate that final control structure side slopes must not exceed a gradient of 1:3 (vertical:horizontal) or 33%. This criterion is consistent with the design criteria established at 30 TAC §317.4 for embankment walls on wastewater stabilization ponds.

Vulcan commented on the requirement for two feet of freeboard for all treatment, detention, and water storage tanks and ponds found at §311.80(2). Vulcan stated that the commission should clarify that the provision applies to sources that are utilized as control structures and not to water sources in place to support the operations of the quarry.

The requirement for two feet of freeboard for treatment, detention, and water storage tanks and ponds at §311.80(2) is incorporated into the rules to address the potential for overflows from these structures that would impact receiving waters. This provision was incorporated into the proposed rules to preclude overflows from treatment and detention structures containing sedi-

ment loadings that would impact receiving waters. Additionally, water storage structures are also included to preclude overflows from water storage structures due to the potential for overflows from these structures, and treatment and detention structures, to impact receiving waters through erosion as these overflows acquire sediment loadings prior to discharge into a receiving water. For this reason, the commission has retained the requirement found at §311.80(2) at adoption, that requires two feet of freeboard for all treatment, detention, and water storage tanks and ponds.

TXI and Vulcan have commented on the requirements for tertiary containment. TXI and Vulcan stated that requirements at §311.80(7) for tertiary containment go beyond federal regulations for spill control. TXI asserted that the protection of aquifers was not directed by SB 1354 and is inconsistent with the legislative intent. TXI requested that definitions for aquifer at §311.71(3) and tertiary containment at §311.71(18) be deleted from the proposed rules. Vulcan states that SB 1354 was intended to be a pilot program for protecting the John Graves Scenic Riverway from erosion and sediment deposition; and, as such, Vulcan asserted that requirements for tertiary containment found at §311.80(7) are not applicable.

The commission disagrees with the comment. Prior to SB 1354, quarries located within a water quality protection area in the John Graves Scenic Riverway were subject to the minimum federal requirements for spill control. TWC, §26.553 provides an exclusion to the operational prohibition for quarries located within 200 feet to 1,500 feet of a water body located within a water quality protection area, subject to the commission finding that additional performance criteria, as established by commission rule, are met. Specifically, TWC, §26.553(d)(1)(C) specifies that additional performance criteria established by the commission rule and incorporated into the permit address: "whether operations could affect renewable resource lands, including aquifers and aquifer recharge areas . . .." Section 311.80(7), with supporting definitions at §311.71(3) and §311.71(18) establishes tertiary containment as that performance criteria. Given the aforementioned, the commission has appropriately established more restrictive requirements (i.e., tertiary containment) for spill control for quarries operating under this exclusion.

Existing Quarries

TACA commented on the lack of specific language relating to the period of time between the effective date of the adopted rules and the amount of time required to submit, process, and issue a wastewater permit under the adopted rules. TACA stated concerns regarding quarries that are currently in compliance with Texas Pollutant Discharge Elimination System Permits that would have to cease operations until a permit is issued under the adopted rules. TACA suggested that existing quarries that have maintained authorization under a Texas Pollutant Discharge Elimination System Permit, and maintained compliance with that permit, should be allowed to remain in operation until a permit under the proposed rules is issued. TACA further stated that the commission should develop a general wastewater permit to authorize wastewater discharges, rather than require an individual permit.

The commission agrees with this comment and has added text at §311.82 to address existing quarries. In accordance with the requirements at TWC, §26.553(b), the commission is developing a general permit that will provide authorization under this subchapter to quarries located outside the 100-year floodplain and greater than one mile from a water body located within a water quality protection area in the John Graves Scenic Riverway.

Professional Certification

GEOS, one individual, TBPG, and TXI have commented on the professional certification requirements for the Restoration Plan, Technical Demonstration, and Reclamation Plan. TBPG recommended changes to the rule text that would allow a licensed Texas professional geoscientist to certify those aspects of the Restoration Plan, Technical Demonstration, and Reclamation Plan that are geoscience in nature. GEOS stated and provided supporting examples that many of the components of the Restoration Plan, Technical Demonstration, and Reclamation Plan require the expertise of a geoscientist or other professional. GEOS commented that those aspects of the Restoration Plan, Technical Demonstration, and Reclamation Plan should be completed under the responsible charge of and certified by a licensed Texas professional geoscientist. One individual stated that the components of the Restoration Plan, Technical Demonstration, and Reclamation Plan require the expertise of geologists and soil scientists, both of which are licensed in the State of Texas, and should provide for those professionals to certify appropriate components of the Restoration Plan, Technical Demonstration, and Reclamation Plan. TXI comments on the lack of necessity for the certification of the Technical Demonstration or Reclamation Plan by a licensed Texas professional engineer.

The commission revised the rule text and allows, within the appropriate area or discipline, for certification of the Restoration Plan, Technical Demonstration, and Reclamation Plan by a licensed Texas professional engineer or a licensed Texas professional geoscientist. Component parts of the Restoration Plan, Technical Demonstration, and Reclamation Plan may be independently certified by these professionals.

Investigations, Compliance, and Enforcement

The BRCC commented that twice annual inspection of the John Graves Scenic Riverway is insufficient for adequate oversight and that the success of the 20-year pilot project on the John Graves Scenic Riverway will be dictated by the effectiveness of inspection and enforcement actions.

The commission agrees that inspection and enforcement activities will play an important role in the success of the 20-year pilot project on the John Graves Scenic Riverway. The statutory requirement to inspect the John Graves Scenic Riverway twice a year both by the air and boat is in addition to existing storm water requirements and any other investigation programs that the commission administers. The commission has the ability to focus resources to address problems that may develop along the John Graves Scenic Riverway. The ability to focus agency resources was clearly demonstrated during the 2004 quarry initiative where investigations were conducted at over 300 mining operations in a month, resulting in 127 Notices of Violation, 38 Notices of Enforcement, and six referrals to the Texas Office of the Attorney General. The commission has staff in the Dallas-Fort Worth Office that will be conducting routine inspections, as necessary, at quarries. Dallas-Fort Worth Office staff are also able to respond to complaints. The commission maintains that the mandatory inspections, coupled with our ability to respond to complaints in a timely manner and focus resources as necessary, will be sufficient to detect any developing problems along the John Graves Scenic Riverway.

The BRCC noted that compliance with the new rules for small or micro-businesses will be limited at best.

The commission recognizes that many of the quarries within a water quality protection area in the John Graves Scenic Riverway are small or micro-businesses. The majority of these quarries currently maintain authorization to discharge under the multi-sector industrial storm water permit (MSGP). Under the MSGP, quarries are required to develop a storm water pollution prevention plan and utilize best management practices. The proposed rules establish additional requirements for quarries in the John Graves Scenic Riverway which build upon the MSGP requirements. In order to continue operating, these quarries will have to seek and obtain authorization under the adopted rules. The commission is conducting outreach within the John Graves Scenic Riverway and developing guidance regarding the Restoration Plan, Technical Demonstration, and Reclamation Plan in an effort to assist quarries in complying with the adopted rules. The commission will also continue to inspect and respond to complaints regarding quarries to ensure compliance.

The BRCC stated that enforcement of the proposed regulations will be extremely difficult.

The TCEQ disagrees with this comment. The proposed rules have several requirements that will aid TCEQ inspectors in determining compliance with the adopted rules such as: maintenance of depth markers and rain gauges, operating distance requirements, and recordkeeping requirements.

Fiscal Impacts and Funding

The BRCC and Vulcan have commented on the financial assessment of the proposed rules. Specifically, the BRCC and Vulcan question how these proposed rules will have no significant fiscal implications for the commission or other state and local governmental entities.

The commission reviews, primarily, those fiscal implications realized in the implementation and ongoing management of adopted rules for the commission and other state and local governmental entities. The commission is the primary governmental entity charged with the implementation and management of programs associated with the adopted rules. In reviewing the fiscal implications for the commission, the resources committed through the 2004 quarry initiative and SB 1354 rulemaking efforts were considered. The allocation of these resources was realized through prioritizing activities associated with the 2004 quarry initiative and SB 1354 rulemaking efforts. The effectiveness of this prioritization was realized in the 2004 quarry initiative, which produced 127 Notices of Violation, 38 Notices of Enforcement, and six referrals to the Texas Office of the Attorney General from investigations at over 300 mining operations conducted within a month. Based on this demonstrated ability to dedicate resources through prioritization, the commission determined that there were no significant fiscal implications.

The BRCC commented on the lack of additional funding provided for implementing the proposed rules. The BRCC recommended changes to wastewater permitting fees to specifically provide funding for the implementation and enforcement of these rules. Additionally, the BRCC recommended that all wastewater permits be renewed annually, with fees assessed likewise.

The commission currently assesses an annual Consolidated Water Quality Fee for all wastewater permits. The Consolidated Water Quality Fee is determined based upon the type of permit, permitted flow, potential toxicity, and other factors. Consolidated Water Quality Fees range from a minimum of $100 to a maximum of $75,000. The commission is currently evaluating the Consolidated Water Quality Fee structure to determine adequacy in the support of water quality monitoring, permitting, inspection, enforcement, and other commission activities. Wastewater permits subject to the adopted rules may be considered for increased fees due to the additional permit application review involved with the Restoration Plan, Technical Demonstration, and Reclamation Plan. The commission renews Texas Pollutant Discharge Elimination System Permits at a maximum of every five years in accordance with §305.71, and Texas Land Application Permits at a maximum of every ten years.

Miscellaneous

Four hundred twenty-nine individuals commented that sand mining is not regulated in Texas, specifically expressing concerns over the impact of sand mining on the San Jacinto River. These individuals state that establishing this pilot program within a water quality protection area in the John Graves Scenic Riverway is a step towards protecting all Texas rivers, including the San Jacinto River, from the effects of sand mining.

The proposed subchapter implements TWC, §26.552. This statute expressly limits its application to the John Graves Scenic Riverway. The commission appreciates this comment, but the provisions of the subchapter are not applicable to the San Jacinto River, and the comment is outside the scope of this rulemaking.

Harris County commented that regulations exist to prevent erosion and storm water runoff that are not enforced and noted specific impacts from these violations on the San Jacinto River.

The proposed subchapter implements TWC, §26.552. This statute expressly limits its application to the John Graves Scenic Riverway. The commission appreciates this comment, but the provisions of the subchapter are not applicable to the San Jacinto River, and the comment is outside the scope of this rulemaking.

Four hundred twenty-nine individuals stated general support for the proposed rules. Hilgers Bell stated support for the discussion within the preamble regarding expansions of facilities excluded from this subchapter at §311.72(b)(2) and (3). Lloyd Gosselink stated general support for the proposed rules, citing consistency with the language of the statute and legislative intent. Lloyd Gosselink also stated support for the definitions of quarry and aggregate, §311.72(b)(2) and (5), and preamble discussion regarding the exclusion for quarries mining clay and shale for use in manufacturing structural clay products. TXI stated support for the inclusion of the definition of 25-year, 24-hour rainfall event at §311.71(1).

The commission acknowledges these comments in support of the rules.

STATUTORY AUTHORITY

The new rules are adopted under TWC, §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013; §5.120, which states the commission shall administer the law so as to promote the judicious

use and maximum conservation and protection of the quality of the environment and the natural resources of the state; §26.011, which provides the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and §26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state. Rulemaking authority is expressly granted to the commission to adopt rules under TWC, Chapter 26 as amended by SB 1354, §2.

The adopted new rules implement SB 1354, which creates TWC, Chapter 26, new Subchapter M. SB 1354, §2, expressly requires the commission to adopt rules adequate to protect the water resources in a water quality protection area for inclusion in any authorization, including an individual or general permit.

§311.71. Definitions.

The following words and terms, when used in the subchapter, have the following meanings.

(1) 25-year, 24-hour rainfall event--The maximum rainfall event with a probable recurrence interval of once in 25 years, with a duration of 24 hours, as defined by the National Weather Service and Technical Paper Number 40, "Rainfall Frequency Atlas of the U.S.," May 1961, and subsequent amendments; or equivalent regional or state rainfall information.

(2) Aggregates--Any commonly recognized construction material originating from a quarry or pit by the disturbance of the surface, including dirt, soil, rock asphalt, granite, gravel, gypsum, marble, sand, stone, caliche, limestone, dolomite, rock, riprap, or other nonmineral substance. The term does not include clay or shale mined for use in manufacturing structural clay products.

(3) Aquifer--A saturated permeable geologic unit that can transmit, store, and yield to a well, the quality and quantities of groundwater sufficient to provide for a beneficial use. An aquifer can be composed of unconsolidated sands and gravels; permeable sedimentary rocks, such as sandstones and limestones; and/or heavily fractured volcanic and crystalline rocks. Groundwater within an aquifer can be confined, unconfined, or perched.

(4) Best management practices--Any prohibition, management practice, maintenance procedure, or schedule of activity designed to prevent or reduce the pollution of water in the state. Best management practices include treatment, specified operating procedures, and practices to control site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage areas.

(5) John Graves Scenic Riverway--That portion of the Brazos River Basin and its contributing watershed, located downstream of the Morris Shepard Dam on the Possum Kingdom Reservoir in Palo Pinto County, Texas, and extending to the county line between Parker and Hood Counties, Texas.

(6) Natural hazard lands--Geographic areas in which natural conditions exist that pose or, as a result of quarry operations, may pose a threat to the health, safety, or welfare of people, property, or the environment, including areas subject to landslides, cave-ins, large or encroaching sand dunes, severe wind or soil erosion, frequent flooding, avalanches, and areas of unstable geology.

(7) Navigable--Designated by the United States Geological Survey (USGS) as perennial on the most recent topographic map(s) published by the USGS, at a scale of 1:24,000.

(8) Operator--Any person engaged in or responsible for the physical operation and control of a quarry.

(9) Overburden--All materials displaced in an aggregates extraction operation that are not, or reasonably would not be expected to be, removed from the affected area.

(10) Owner--Any person having title, wholly or partly, to the land on which a quarry exists or has existed.

(11) Pit--An open excavation from which aggregates have been, or are being, extracted with a depth of five feet or more below the adjacent and natural ground level.

(12) Quarry--The site from which aggregates for commercial sale are being, or have been, removed or extracted from the earth to form a pit, including the entire excavation, stripped areas, haulage ramps, and the immediately adjacent land on which the plant processing the raw materials is located. The term does not include any land owned or leased by the responsible party not being currently used in the production of aggregates for commercial sale or an excavation to mine clay or shale for use in manufacturing structural clay products.

(13) Quarrying--The current and ongoing surface excavation and development without shafts, drafts, or tunnels, with or without slopes, for the extraction of aggregates for commercial sale from natural deposits occurring in the earth.

(14) Reclamation--The land treatment processes designed to minimize degradation of water quality, damage to fish or wildlife habitat, erosion, and other adverse effects from quarries. Reclamation includes backfilling, soil stabilization and compacting, grading, erosion control measures, appropriate revegetation, or other measures, as appropriate.

(15) Responsible party--Any owner, operator, lessor, or lessee who is primarily responsible for overall function and operation of a quarry located in the water quality protection area as defined in this section.

(16) Restoration--Those actions necessary to change the physical, chemical, and/or biological qualities of a receiving water body in order to return the water body to its background condition. Restoration includes on- and off-site stabilization to reduce or eliminate an unauthorized discharge, or substantial threat of an unauthorized discharge from the permitted site.

(17) Structural controls--Physical, constructed features that prevent or reduce the discharge of pollutants. Structural controls include, but are not limited to, sedimentation/detention ponds; velocity dissipation devices such as rock berms, vegetated berms, and buffers; and silt fencing.

(18) Tertiary containment--A containment method by which an additional wall or barrier is installed outside of the secondary storage vessel or other secondary barrier in a manner designed to prevent a release from migrating beyond the tertiary wall or barrier before the release can be detected.

(19) Water body--Any navigable watercourse, river, stream, or lake within the water quality protection area.

(20) Water quality protection area--The Brazos River and its contributing watershed within Palo Pinto and Parker Counties, Texas, downstream from the Morris Shepard Dam, and extending to the county line between Parker and Hood Counties, Texas.

§311.72. Applicability.

(a) This subchapter applies to a pilot program regulating quarrying within the water quality protection area designated by this subchapter, in the John Graves Scenic Riverway. This subchapter expires on September 1, 2025.

(b) This subchapter does not apply to:

(1) the construction or operation of a municipal solid waste facility regardless of whether the facility includes a pit or quarry that is associated with past quarrying;

(2) a quarry, or associated processing plant, that since on or before January 1, 1994, has been in regular operation without cessation of operation for more than 30 consecutive days and under the same ownership;

(3) the construction or modification of associated equipment located on a quarry site or associated processing plant site described in paragraph (2) of this subsection;

(4) an activity, facility, or operation regulated under Natural Resources Code, Texas Surface Coal Mining and Reclamation Act, Chapter 134; or

(5) quarries mining clay and shale for use in manufacturing structural clay products.

(c) Operations or facilities to which this subchapter does not apply under subsection (b) of this section, must maintain adequate documentation on site sufficient to demonstrate their exclusions.

(1) Documentation demonstrating ownership includes, but is not limited to: deeds, property tax receipts, leases, or insurance records.

(2) Documentation demonstrating continuous operation without cessation of operation for more than 30 consecutive days beginning on or before January 1, 1994, includes, but is not limited to: production records, sales receipts, payroll records, sales tax records, income tax records, or financial statements/reports.

(3) Documentation demonstrating the construction or operation of a municipal solid waste facility, an activity, facility, or operation regulated under Natural Resources Code, Texas Surface Coal Mining and Reclamation Act, Chapter 134; or quarries mining clay and shale for use in manufacturing structural clay products includes, but is not limited to: any permit issued by the commission, Railroad Commission of Texas, or United States Environmental Protection Agency.

§311.74. Authorization.

(a) Any responsible party shall seek and obtain a permit subject to the requirements of Chapters 205 and 305 of this title (relating to General Permits for Waste Discharges and Consolidated Permits).

(b) The following additional requirements imposed through this subchapter for discharges from quarries located within a water quality protection area in the John Graves Scenic Riverway are based on the location of the quarry.

(1) In addition to the requirements of Chapters 205 and 305 of this title, a quarry located within a water quality protection area in the John Graves Scenic Riverway must meet the following requirements:

(A) §311.75(1) of this title (relating to Permit Application Requirements);

(B) §311.79 of this title (relating to Performance Criteria for Quarries Located Within a Water Quality Protection Area in the John Graves Scenic Riverway); and

(C) §311.81(a) of this title (relating to Financial Responsibility for Quarries Located Within a Water Quality Protection Area in the John Graves Scenic Riverway).

(2) In addition to the requirements of Chapters 205 and 305 of this title and paragraph (1) of this subsection, any quarry located within the 100-year floodplain or within one mile of a water body within a water quality protection area in the John Graves Scenic Riverway must obtain an individual permit.

(3) In addition to the requirements of Chapters 205 and 305 of this title and paragraphs (1) and (2) of this subsection, all quarries located within 200 feet to 1,500 feet of a water body within a water quality protection area in the John Graves Scenic Riverway, and subject to the prohibition under §311.73(b) of this title (relating to Prohibitions), must meet the following requirements:

(A) §311.75(2) of this title;

(B) §311.80 of this title (relating to Additional Performance Criteria for Quarries Located Between 200 Feet and 1,500 Feet of a Water Body Located Within a Water Quality Protection Area in the John Graves Scenic Riverway); and

(C) §311.81(b) of this title.

(4) For any quarry subject to the provisions of paragraph (2) of this subsection , a part of which is also located outside of the 100-year floodplain of, or beyond one mile from, a water body, the requirements of paragraph (2) of this subsection are applicable to the entire quarry. The executive director may waive, modify, or otherwise adjust these requirements for that portion of the quarry located outside of the 100-year floodplain of, or beyond one mile from, a water body.

(5) For any quarry subject to the provisions of paragraph (3) of this subsection , a part of which is also located more than 1,500 feet from a water body, the requirements of paragraph (3) of this subsection will be applicable to the entire quarry. The executive director may waive, modify, or otherwise adjust these requirements for that portion of the quarry located more than 1,500 feet from a water body.

§311.76. Restoration Plan.

(a) The Restoration Plan must include a proposed plan of action for how the responsible party will restore the receiving waters to background conditions in the event of an unauthorized discharge that affects those receiving waters. The Restoration Plan, at a minimum, must:

(1) identify receiving waters at risk of an unauthorized discharge from the quarry;

(2) describe the process to be used in documenting the existing physical, chemical, and/or biological background conditions of each of the adjacent receiving waters;

(3) provide a schedule for completing the determination of background conditions of each of the receiving waters and for updating background conditions in the future, as appropriate;

(4) identify the goals and objectives of potential restoration actions;

(5) provide a reasonable range of restoration alternatives and the preferred restoration alternative that may be implemented to return the affected waters to background conditions in the event of an unauthorized discharge;

(6) describe the process for monitoring the effectiveness of the preferred restoration action, including performance criteria, that will be used to determine the success of the restoration or need for interim site stabilization;

(7) identify a process for public involvement in the selection of the restoration alternative to be implemented to restore the receiving waters to background conditions; and

(8) provide a detailed estimate of the maximum probable costs required to complete a restoration action, given the size, location, and description of the quarry and the nature of the receiving waters. The maximum probable cost must be based on the costs to a third party

conducting the action without a financial interest or ownership in the quarry.

(b) Certification of the Restoration Plan must be provided, within the appropriate area or discipline, by a licensed Texas professional engineer or a licensed Texas professional geoscientist. Components of the Restoration Plan may be independently certified, as appropriate.

§311.77. Technical Demonstration.

(a) The Technical Demonstration must include, at a minimum:

(1) a time schedule for the proposed quarry from initiation to termination of operations, including reclamation;

(2) a detailed description of the type of quarrying to be conducted, including the processes/methods employed (e.g., pit mining where blasting is employed);

(3) a geological description of the quarry area, including a detailed description of the material deposit: type, geographical extent, depth, and volume; and a description of the general area geology;

(4) identification and a detailed description of any other operations on site, including raw-material processing and/or secondary products (e.g., cement) processing;

(5) identification and a detailed description of type, character, and volume of wastewater and storm water generated on site;

(6) a topographic map, at a scale appropriate to represent the quarry operation and all of the following within the boundaries of the quarry:

(A) waterbodies;

(B) existing and proposed roads including quarry access roads;

(C) existing and proposed railroads;

(D) the 100-year floodplain boundaries, if applicable;

(E) structures (e.g., office buildings);

(F) the location of all known wells including, but not limited to, water wells, oil wells, and uplugged and abandoned wells;

(G) active, post, and reclaimed quarrying areas;

(H) buffer areas;

(I) raw material, intermediate material, final product, waste product, byproduct, and/or ancillary material storage and processing areas;

(J) chemical and fuel storage areas;

(K) vehicle/equipment maintenance, cleaning, and fueling areas;

(L) vehicle/equipment loading and unloading areas;

(M) baghouses and other air treatment units exposed to precipitation; and

(N) waste disposal areas;

(7) a Surface Water Drainage and Water Accumulation Plan. The Surface Water Drainage and Water Accumulation Plan must be designed to prevent damage to fish, wildlife, and fish/wildlife habitat from erosion, siltation, and runoff from quarry operations. The Surface Water Drainage and Water Accumulation Plan must, at a minimum:

(A) describe the use and monitoring of structural controls and best management practices as identified in paragraph (8) of this subsection designed to control erosion, siltation, and runoff; and

(B) provide a topographic map, at a scale appropriate to represent the quarry operation and all of the following within the boundaries of the quarry:

(i) the location of each process wastewater and/or storm water outfall;

(ii) an outline of the drainage area that contributes storm water to each outfall;

(iii) treatment, detention, and water storage tanks and ponds;

(iv) structural controls for managing storm water and/or process wastewater; and

(v) physical features of the site that would influence storm water runoff or contribute a dry weather flow; and

(8) a Best Available Technology Evaluation. The Best Available Technology Evaluation assists staff in reviewing and determining the best available technology designed to control erosion, siltation, and runoff from the quarry to minimize disturbance and adverse effects to fish, wildlife, and related environmental resources. Where practical, the Best Available Technology Evaluation must assist staff in reviewing and determining best available technology designed to enhance fish, wildlife, and related environmental resources.

(A) The Best Available Technology Evaluation must assess the use of structural controls and best management practices.

(B) The Best Available Technology Evaluation must evaluate performance criteria outlined in §311.79 and §311.80 of this title (relating to Performance Criteria for Quarries Located Within a Water Quality Protection Area in the John Graves Scenic Riverway and Additional Performance Criteria for Quarries Located Between 200 Feet and 1,500 Feet of a Water Body Located Within a Water Quality Protection Area in the John Graves Scenic Riverway).

(C) Structural control design and construction must be certified by a licensed Texas professional engineer. Design and construction plans/specifications must be maintained on site and made available at the request of the executive director; and

(9) a procedure and schedule for reviewing the Technical Demonstration for consistency with quarry operations and site conditions and effectiveness in controlling erosion, siltation, and runoff.

(b) Certification of the Technical Demonstration must be provided, within the appropriate area or discipline, by a licensed Texas professional engineer or a licensed Texas professional geoscientist. Components of the Technical Demonstration may be independently certified, as appropriate.

§311.78. Reclamation Plan.

(a) The Reclamation Plan establishes procedures and standards for reclamation of the quarry.

(1) The Reclamation Plan must, at a minimum:

(A) provide a description of the proposed use of the disturbed area following reclamation;

(B) develop site-specific standards for reclamation appropriate to the end use proposed in subparagraph (A) of this paragraph that addresses the following:

(i) removal or final stabilization of all raw material, intermediate material, final product, waste product, byproduct, and/or ancillary material;

(ii) removal of waste or closure of all waste disposal areas;

(iii) removal of structures, where appropriate;

(iv) removal and reclamation of all temporary roads and/or railroads;

(v) backfilling, regrading, and recontouring;

(vi) slope stability for remaining highwalls and detention ponds;

(vii) revegetation of the reclaimed area giving consideration to species diversity and the use of native species;

(viii) establishment of wildlife habitat;

(ix) establishment of drainage patterns;

(x) establishment of permanent control structures (e.g., retention ponds), where necessary, to address erosion, siltation, and runoff from post quarrying and reclaimed areas; and

(xi) removal of all equipment;

(C) provide a description of how reclamation will be conducted (e.g., phased reclamation) and a timetable for the completion of reclamation activities.

(2) The Reclamation Plan must include a detailed estimate of the maximum probable cost required to complete and implement the plan. The maximum probable cost must be based on the cost to a third party conducting the reclamation without a financial interest or ownership in the quarry operation.

(b) Certification of the Reclamation Plan must be provided, within the appropriate area or discipline, by a licensed Texas professional engineer or a licensed Texas professional geoscientist. Components of the Reclamation Plan may be independently certified, as appropriate.

§311.81. Financial Responsibility for Quarries Located Within a Water Quality Protection Area in the John Graves Scenic Riverway.

(a) An owner or operator of a quarry located within a water quality protection area in the John Graves Scenic Riverway shall establish and maintain financial assurance for restoration in accordance with Chapter 37, Subchapter W of this title (relating to Financial Assurance for Quarries). The amount of financial assurance must be no less than the amount determined by the executive director as sufficient to meet the requirements of the Restoration Plan in §311.76(a)(8) of this title (relating to Restoration Plan).

(b) An owner or operator of a quarry located between 200 feet and 1,500 feet of a water body within a water quality protection area in the John Graves Scenic Riverway shall establish and maintain financial assurance for reclamation in accordance with Chapter 37, Subchapter W of this title. The amount of financial assurance must be no less than the amount determined by the executive director as sufficient to meet the requirements of the Reclamation Plan in §311.78(a)(2) of this title (relating to Reclamation Plan).

§311.82. Existing Quarries.

(a) Existing quarries required to seek and obtain authorization in accordance §311.74(b)(1) of this title (relating to Authorization), must submit a Notice of Intent as required by a commission-issued general permit, in accordance with §311.74(b)(1) of this title. Subject to the provisions of this subsection and maintaining compliance, existing quarries subject to the requirements of §311.74(b)(1) of this title that have authorization under a Texas Pollutant Discharge Elimination System Permit or Texas Land Application Permit issued under Chapters 205 and 305 of this title (relating to General Permits for Waste Discharges and Consolidated Permits), may continue to operate under the terms of that permit until the commission issues or denies authorization under this subchapter.

(b) Existing quarries required to seek and obtain authorization in accordance with §311.74(b)(2) of this title must submit an individual Texas Pollutant Discharge Elimination System or Texas Land Application Permit application not later than 180 days following the effective date of this subchapter. Subject to the provisions of this subsection and maintaining compliance, existing quarries subject to the requirements of §311.74(b)(2) of this title that have authorization under a Texas Pollutant Discharge Elimination System Permit or Texas Land Application Permit issued under Chapters 205 and 305 of this title, may continue to operate under the terms of that permit until the commission issues or denies authorization under this subchapter.

(c) Existing quarries required to seek and obtain authorization in accordance with §311.74(b)(3) of this title must submit an individual Texas Pollutant Discharge Elimination System or Texas Land Application Permit application not later than 180 days following the effective date of this subchapter. An existing quarry may not operate until the commission issues authorization under this subchapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 14, 2006.

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Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-5017

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CHAPTER 335. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE SUBCHAPTER H. STANDARDS FOR THE MANAGEMENT OF SPECIFIC WASTES AND SPECIFIC TYPES OF FACILITIES DIVISION 5. UNIVERSAL WASTE RULE

30 TAC §335.261

The Texas Commission on Environmental Quality (TCEQ or commission) adopts the amendment to §335.261 *with changes* to the proposed text as published in the February 10, 2006, issue of the *Texas Register* (31 TexReg 823).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

House Bill (HB) 2793, passed by the 79th Legislature, 2005, requires the commission to adopt rules for regulating a mercury-containing automobile convenience switch as a universal waste as defined under §335.261. Handlers of universal wastes are subject to less stringent standards for reporting, storing, transporting, and collecting these wastes.

The United States Environmental Protection Agency (EPA) published a final rule, effective August 5, 2005, that adds mercury-containing equipment (MCE) to the federal list of universal wastes regulated under the hazardous waste regulations of the Resource Conservation and Recovery Act (RCRA). The EPA concluded that regulating spent MCE, including convenience switches, as a universal waste would lead to better management of the mercury contained in this equipment and would facilitate compliance with hazardous waste requirements. The adopted rule implements provisions of HB 2793 by adopting an existing federal rule and adding MCE waste to the existing list of universal wastes.

Background on MCE

MCE consists of devices, items, or articles that contain varying amounts of elemental mercury that is integral to their functions. MCE includes several types of instruments used throughout the electric utility industry, other industries, municipalities, and households. Some commonly recognized devices are thermostats, barometers, manometers, and convenience light switches in automobiles. EPA's definition does not include mercury waste that a process of manufacturing or treatment generates as a by-product.

MCE waste is a solid waste and likely to be a hazardous waste when disposed of or reclaimed due to the toxicity characteristic (see definitions in the federal regulations in 40 Code of Federal Regulations (CFR) §261.2 and §261.3 and in TCEQ regulations in §335.1(62) and (131)). Some spent MCE contains a few grams of mercury, whereas larger articles, items, and devices can contain much more mercury. Many of these pieces of equipment would fail the toxicity characteristic leaching procedure (TCLP) level for mercury of 0.2 milligrams per liter and would therefore be a D009 characteristic hazardous waste (see federal regulations in 40 CFR §261.24, Table 1, and TCEQ regulations in §335.29).

A variety of industries generate spent MCE. Electric and gas utilities generate the greatest amount of this waste, but many other sectors, including medicine, farming, and automobile manufacturing, use MCE to regulate pressure and temperature, or to conduct electricity in switches or regulators. Generators of spent MCE, then, are from a wide range of sectors: utilities, manufacturers, commercial establishments, universities, hospitals, and households.

Rationale for the Universal Waste Rule and its Expansion

In 1995, EPA promulgated the universal waste rule to establish a streamlined hazardous waste management system for widely generated hazardous wastes as a way to encourage environmentally sound collection and proper management of the wastes. EPA included hazardous waste batteries, certain hazardous waste pesticides, mercury-containing thermostats, and hazardous waste lamps on the federal list of universal wastes. The TCEQ adopted an equivalent universal waste rule in 1997, with an amendment in 1999 to allow for paint and paint-related wastes to be managed as universal waste in Texas.

In 2005, the 79th Legislature passed HB 2793 requiring the TCEQ to adopt rules for regulating a convenience switch as a universal waste. The EPA rule, adopted August 5, 2005, in allowing for MCE to be designated as universal waste, allows convenience switches to be designated as universal waste. The commission believes that adopting the EPA rule by reference simplifies storage, handling, recycling, and disposal of MCE. It also helps ensure that spent MCE will be sent to the appropriate destination facilities, which would manage it as a hazardous waste with all applicable Subtitle C requirements. Specifically, under the commission's adopted rule, rather than having to comply with the full RCRA Subtitle C regulations, handlers and transporters who generate or manage MCE designated as universal waste are subject to the management standards under 40 CFR Part 273 and its state-equivalent, Chapter 335, Subchapter H, Division 5. Handlers include universal waste generators and collection facilities. The regulations distinguish between "large-quantity handlers of universal waste" (those who handle 5,000 kilograms or more total of universal waste at one time) and "small-quantity handlers of universal waste" (those who handle less than 5,000 kilograms or more total of universal waste at one time). The 5,000-kilogram accumulation criterion applies to the quantity of all universal wastes accumulated.

The adopted rule incorporates streamlined standards for storage, labeling and marking, preparing MCE waste for shipment off site, employee training, response to releases, and notification. However, the adopted rule is not likely to impose an additional burden on many who will fall within the expanded regulated community handling MCE. This is because the adopted packaging and labeling standards for spent MCE are already in place for used thermostats, a subset of MCE. Moreover, these streamlined standards should also encourage proper handling and recycling of the waste.

The adopted rule also subjects transporters of universal waste to less stringent requirements than the full, Subtitle C hazardous waste transportation regulations and TCEQ regulations in Chapter 335, Subchapter D. The primary difference between the universal waste transporter requirements and the full hazardous waste transportation requirements is that the transport of universal waste requires no manifest.

The commission maintains that the adopted universal waste requirements will be highly effective in mitigating risks posed by spent MCE. Specifically, the requirements for handlers to manage and transport ampules of mercury in a way that will prevent breakage, or to seal the MCE in its original housing and ship it sealed, should help ensure safe management and transport. In addition, the universal waste program requires proper training for employees on handling universal waste, responding to releases, and shipping in accordance with Department of Transportation regulations. These requirements should lower the risks posed during accumulation and transport.

The TCEQ expects that managing spent MCE as universal waste will increase the collection of this equipment. As a result, the adopted rule should increase the amount of mercury being diverted from the non-hazardous waste stream into the hazardous waste stream because it allows Texas handlers, especially those that generate this waste sporadically and in small volumes, to send it to a central consolidation point. Before EPA's adopted rule expanding universal wastes to include MCE, an entity in Texas could not consolidate these materials for more than 90 days unless it had a RCRA permit. Under the federal universal waste rule and the TCEQ's adopted universal waste rule, a handler of universal waste can send the universal waste to another handler, who can consolidate it into a larger shipment.

Another benefit of the adopted rule should be improved implementation and compliance with the state's hazardous waste regulatory program. The commission believes that the structure and requirements of the universal waste rule are compatible with the circumstances of handlers of spent MCE. Being able to handle MCE as universal waste will most likely improve compliance

with the hazardous waste regulations. Because spent MCE is generated in small quantities in geographically dispersed operations, compliance with full Subtitle C requirements is difficult to achieve. Compliance with Subtitle C is particularly difficult for electric or gas utility operations that are located on customers' properties. In addition, handlers of spent MCE who are infrequent generators of hazardous waste and who might otherwise be unfamiliar with the more complex Subtitle C management structure, but who generate spent MCE, will be able to more easily send this waste for proper management. For example, under the TCEQ's adopted universal waste rule, a fire station, community center, or retail store can participate in an MCE collection program without having to get a RCRA permit, as full Subtitle C regulation would require. The TCEQ can encourage individual households and conditionally exempt small quantity generators to participate in such programs which would divert MCE from the municipal waste stream. The consolidation of MCE at facilities, which is made possible by the adopted universal waste rule, should significantly reduce the administrative and financial burden of collection and transportation of MCE. Therefore, adding spent MCE to the universal waste rule should improve compliance with the hazardous waste regulations. Improved compliance will be likely to benefit human health and the environment.

When managed improperly, mercury poses a threat to human health and the environment. The adopted addition of MCE waste to the list of universal wastes should help ensure that MCE waste ends up at a destination facility equipped to manage it properly. This adopted rule streamlines requirements only for generators and transporters of universal waste. The stringent regulation of "destination facilities" remains the same. "Destination facilities" treat, store, dispose, or recycle universal wastes. Universal waste destination facilities are subject to all currently applicable requirements for hazardous waste treatment, storage, and disposal facilities (TSDFs) and must receive a RCRA permit for such activities. For example, destination facilities must comply with the substantive requirements of the land disposal restriction (LDR) provisions of the Hazardous and Solid Waste Amendments of 1984 and the TCEQ's LDR provisions in §335.431. These include a prohibition on accumulating prohibited wastes directly on the ground; a requirement to treat waste to meet treatment standards before land placement; a prohibition on dilution; and a prohibition on accumulation, except for purposes of accumulating quantities sufficient for proper recovery, treatment, or disposal. The commission contends that compliance with the substantive requirements of the LDR program is necessary to minimize risks from mismanaging spent MCE. The commission expects that allowing spent MCE to be universal waste will make collection and transportation of this waste to an appropriate facility easier and, therefore, will reduce the amount of mercury released into the environment.

In summary, the commission maintains that expanding the universal waste list to include spent MCE is a sound way to address the environmental hazards of spent MCE. Handlers will be operating within a simple, streamlined management system with some limited oversight. The universal waste rules, as adopted, address the environmental concerns surrounding the management of MCE wastes, while at the same time putting into place a structure that better facilitates, and encourages, the increased collection of spent MCE.

SECTION BY SECTION DISCUSSION

The commission adopts administrative changes throughout these sections to be consistent with Texas Register requirements and other agency rules and guidelines and to conform to the drafting standard in the *Texas Legislative Council Drafting Manual*, November 2004.

Section 335.261, Universal Waste Rule

The adopted amendment to §335.261(a) updates a reference to the *Federal Register*.

The adopted amendment to §335.261(b)(2) changes the reference, "Texas Natural Resource Conservation Commission," to "Texas Commission on Environmental Quality."

The adopted amendment to §335.261(b)(12) changes the meaning of a reference to 40 CFR "§273.9" from equating solely to the TCEQ's definition of "thermostats," as contained in §335.261(b)(16)(E), to encompassing 40 CFR §273.9 in addition to the definition of "thermostats."

The adopted amendment to §335.261(b)(15) updates a reference from 40 CFR and adds to what, in Chapter 335, that reference is changed to.

The adopted amendment to §335.261(b)(16)(F)(iii) adds "mercury-containing equipment" to the list of hazardous wastes subject to the universal waste requirements of the section.

In §335.261(b), existing paragraph (21) is deleted since it was created solely to clarify references which no longer exist. Section 335.261(b)(22) - (29) is renumbered as §335.261(b)(21) - (28). Section 335.261(b)(29) is added to change a new reference in 40 CFR §273.33(c)(4)(i), "40 CFR Part 261, subpart C," to "Chapter 335, Subchapter R of this title (relating to Waste Classification)." In 335.261(b), existing paragraph (30) is deleted since it was created solely to clarify references which no longer exist. Section 335.261(b)(30) is added to change a new reference in 40 CFR §273.33(c)(3)(ii), "40 CFR parts 260 through 272," to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. Furthermore, it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Although this rule is adopted to protect the environment and reduce the risk to human health from environmental exposure, it is not a major environmental rule because it will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The rule will not adversely affect in a material way the previously mentioned aspects of the state because the rule provides for streamlined waste-management standards for certain MCE, which in turn should provide an overall benefit to the economy, certain sectors of the economy, productivity, competition, jobs, the environment, affected sectors of the state, and the public health and safety of the state. More simply stated, the adopted amendments revise the commission's hazardous waste rules in a manner which should benefit the economy while enhancing the protection of the environment and public health and safety, as per the following explanation. The overall benefit from streamlining waste management standards for certain MCE is that the new standards reduce the regulatory burden on persons generating or collecting these wastes. The streamlined waste-management

standards for certain MCE should provide a benefit to the economy, certain sectors of the economy, productivity, competition, and jobs by lessening regulatory requirements, thus costing certain companies less. The rule should be a benefit by facilitating environmentally sound collection and increasing the proper recycling and processing of MCE. There should be no adverse effect because the rule is designed to maintain protection of the environment, the public health, and the public safety of the state and all sectors of the state. In other words, the TCEQ anticipates that the adopted standards will reduce regulatory requirements while facilitating an alternative for the collection of MCE and increasing the proper recycling and processing of these wastes.

Furthermore, the adopted rule does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). The rule does not exceed a standard set by federal law because the purpose of this rulemaking is to adopt federal rules by reference, with no additional state standards. Requirements in the adopted rule are in accordance with the corresponding federal regulations, and they do not exceed an express requirement of state law as there is no express requirement in state law concerning universal wastes. The adopted rule does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program because the rule fits the framework of the corresponding federal universal waste regulations. See 40 CFR §271.21, relating to procedures, for revision of state programs and 40 CFR Part 273, relating to standards for universal waste management. The rulemaking adopts a rule under specific state law (i.e., Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.017 and §361.024). Finally, this rulemaking is not being adopted on an emergency basis either to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

In accordance with Texas Government Code, §2007.043, the commission has prepared a takings impact assessment for the adopted rule. The following is a summary of that assessment. The specific purpose of the adopted rule is to provide an alternative for the collection of MCE, facilitating environmentally sound collection and increasing the proper recycling and processing of MCE. The adopted rule should substantially advance this purpose through environmentally protective, streamlined standards relating to universal wastes meeting the definition of MCE. Promulgation and enforcement of the adopted rule will not affect private property because the rule provides an alternative set of management standards for MCE in lieu of other, more stringent hazardous waste regulations, representing a streamlined approach. The adopted standards are not more stringent than existing standards. In addition, the reduction of regulatory requirements will be taken only at the initiative of certain persons managing MCE. For these reasons, the adopted rule will not be a burden to private real property and will not constitute a taking under Texas Government Code, Chapter 2007. The adopted rule will not affect a landowner's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the adopted rule is subject to the Texas Coastal Management Program (CMP) and must be consistent with all applicable goals and policies of the CMP. In accordance with 31 TAC §505.22, the commission has prepared a consistency determination for the adopted rule and has found that it is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goals applicable to the rulemaking are to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). CMP policies focus on construction and operation of solid waste treatment, storage, and disposal facilities, such that new solid waste facilities and areal expansions of existing solid waste facilities shall be sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 United States Code, §§6901 *et seq*. Promulgation and enforcement of this rule will be consistent with the applicable CMP goals and policies because the rule will facilitate the environmentally sound collection of MCE wastes, increase the proper recycling and processing of MCE wastes, and enable programs developed to reduce the quantity of these wastes going to municipal solid waste landfills or incinerators. The rule should also help assure that the wastes go to appropriate processing and recycling facilities under full RCRA Subtitle C hazardous waste regulatory controls. Thus, the rule will serve to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of CNRAs. Adding MCE to the list of universal wastes will not impact new solid waste facilities and areal expansions of existing solid waste facilities. The commission has determined that the specific actions detailed in this section and earlier in this preamble under the sections explaining the adopted rule, concerning explanation of the adopted rule, final regulatory impact assessment, and takings impact assessment comply with the goals and policies of the CMP. In addition, the adopted rule does not violate any applicable provisions of the CMP's stated goals and policies.

PUBLIC COMMENT

The TCEQ did not receive any comments on the rule proposal. The comment period was 30 days. It began on February 10, 2006, and ended on March 13, 2006.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under THSC, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Solid Waste Disposal Act.

The adopted amendment implements THSC, Chapter 375, which relates to convenience switches from motor vehicles to be classified as universal waste.

§335.261. Universal Waste Rule.

(a) This section establishes requirements for managing universal wastes as defined in this section, and provides an alternative set of management standards in lieu of regulation, except as provided in this section, under all otherwise applicable chapters under 30 Texas Administrative Code. Except as provided in subsection (b) of this section, 40 Code of Federal Regulations (CFR) Part 273 is adopted by reference as amended and adopted in the *Federal Register* through August 5, 2005 (70 FR 45508).

(b) 40 CFR Part 273, except §273.1, is adopted subject to the following changes.

(1) The term "regional administrator" is changed to "executive director" or "commission" consistent with the organization of the commission as set out in the Texas Water Code, Chapter 5.

(2) The terms "U.S. Environmental Protection Agency" and "EPA" are changed to "the Texas Commission on Environmental Quality," "the agency," or "the commission" consistent with the organization of the commission as set out in Texas Water Code, Chapter 5. This paragraph does not apply to 40 CFR §273.32(a)(3) or §273.52 or to references to the following: "EPA Acknowledgment of Consent" or "EPA Identification Number."

(3) The term "treatment" is changed to "processing."

(4) The term "universal waste" is changed to "universal waste as defined under §335.261(b)(16)(F) of this title (relating to Universal Waste Rule)."

(5) The term "this part" is changed to "Chapter 335, Subchapter H, Division 5 of this title (relating to Universal Waste Rule)."

(6) In 40 CFR §273.2(a) and (b), references to "40 CFR part 266, subpart G," are changed to "§335.251 of this title (relating to Applicability and Requirements)."

(7) In 40 CFR §273.2(b)(2), the reference to "part 261 of this chapter" is changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(8) In 40 CFR §273.3(b)(1), the reference to "40 CFR §262.70" is changed to "§335.77 of this title (relating to Farmers)." Also, the phrase "(40 CFR §262.70 addresses pesticides disposed of on the farmer's own farm in a manner consistent with the disposal instructions on the pesticide label, providing the container is triple rinsed in accordance with 40 CFR 261.7(b)(3))" is deleted.

(9) In 40 CFR §273.3(b)(2), the reference to "40 CFR parts 260 through 272" is changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(10) In 40 CFR §273.3(b)(3), the reference to "part 261 of this chapter" is changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(11) In 40 CFR §273.3(d)(1)(i) and (ii), references to "40 CFR §261.2" are changed to "§335.1 of this title (relating to Definitions)."

(12) In 40 CFR §273.4(a), the reference to "§273.9" as it relates to the definition of "mercury-containing equipment" is amended to include the commission definition of "thermostats" as contained in §335.261(b)(16)(E) of this title (relating to Universal Waste Rule) and in 40 CFR §273.4(b)(1), the reference to "part 261 of this chapter" is changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(13) In 40 CFR §273.5(b)(1), the reference to "part 261 of this chapter" is changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(14) In 40 CFR §273.8(a)(1), the reference to "40 CFR §261.4(b)(1)" is changed to "§335.1 of this title (relating to Definitions)" and the reference to "§273.9" is changed to "§335.261(b)(16)(F) of this title (relating to Universal Waste Rule)."

(15) In 40 CFR §273.8(a)(1), the reference to "40 CFR §261.4(b)(1)" is changed to "§335.78 of this title (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators)" and to "§335.402(5) of this title (relating to Definitions)" and the reference to "§273.9" is changed to "§335.261(b)(16)(F) of this title (relating to Universal Waste Rule)."

(16) In 40 CFR §273.9, the following definitions are changed to the meanings described in this paragraph.

(A) Destination facility--A facility that treats, disposes, or recycles a particular category of universal waste, except those management activities described in 40 CFR §273.13(a) and (c) and 40 CFR §273.33(a) and (c), as adopted by reference in this section. A facility at which a particular category of universal waste is only accumulated is not a destination facility for purposes of managing that category of universal waste.

(B) Generator--Any person, by site, whose act or process produces hazardous waste identified or listed in 40 CFR Part 261 or whose act first causes a hazardous waste to become subject to regulation.

(C) Large quantity handler of universal waste--A universal waste handler (as defined in this section) who accumulates at any time 5,000 kilograms or more total of universal waste (as defined in this section), calculated collectively. This designation as a large quantity handler of universal waste is retained through the end of the calendar year in which 5,000 kilograms or more total universal waste is accumulated.

(D) Small quantity handler of universal waste--A universal waste handler (as defined in this section) who does not accumulate at any time 5,000 kilograms or more total of universal waste (as defined in this section), calculated collectively.

(E) Thermostat--A temperature control device that contains metallic mercury in an ampule attached to a bimetal sensing element, and mercury-containing ampules that have been removed from these temperature control devices in compliance with the requirements of 40 CFR §273.13(c)(2) or §273.33(c)(2) as adopted by reference in this section.

(F) Universal waste--Any of the following hazardous wastes that are subject to the universal waste requirements of this section:

(i) batteries, as described in 40 CFR §273.2;

(ii) pesticides, as described in 40 CFR §273.3;

(iii) mercury-containing equipment, including thermostats, as described in 40 CFR §273.4;

(iv) paint and paint-related waste, as described in §335.262(b) of this title (relating to Standards for Management of Paint and Paint-Related Waste); and

(v) lamps, as described in 40 CFR §273.5.

(17) In 40 CFR §273.10, the reference to "40 CFR §273.9" is changed to "§335.261(b)(16)(D) of this title (relating to Universal Waste Rule)."

(18) 40 CFR §273.11(b) is changed to read as follows: "Prohibited from diluting or treating universal waste, except when responding to releases as provided in 40 CFR §273.17; managing specific wastes as provided in 40 CFR §273.13; or crushing lamps under the control conditions of §335.261(e) of this title (relating to Universal Waste Rule)."

(19) In 40 CFR §273.13(a)(3)(i), the reference to "40 CFR parts 260 through 272" and the reference to "40 CFR part 262" are changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(20) In 40 CFR §273.13(c)(2)(iii) and (iv), references to "40 CFR §262.34" are changed to "§335.69 of this title (relating to Accumulation Time)."

(21) In 40 CFR §273.13(d)(1), the phrase "adequate to prevent breakage" is changed to "adequate to prevent breakage, except as specified in §335.261(e) of this title (relating to Universal Waste Rule)."

(22) In 40 CFR §273.17(b), the reference to "40 CFR parts 260 through 272" and the reference to "40 CFR part 262" are changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(23) In 40 CFR §273.20(a), the reference to "40 CFR §§262.53, 262.56(a)(1) through (4), (6), and (b) and 262.57" is changed to "§335.13 of this title (relating to Recordkeeping and Reporting Procedures Applicable to Generators Shipping Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste) and §335.76 of this title (relating to Additional Requirements Applicable to International Shipments)."

(24) In 40 CFR §273.20(b), the reference to "subpart E of part 262 of this chapter" is changed to "§335.13 of this title and §335.76 of this title."

(25) In 40 CFR §273.30, the reference to "§273.9" is changed to "§335.261(b)(16)(C) of this title (relating to Universal Waste Rule)."

(26) 40 CFR §273.31(b) is changed to read as follows: "Prohibited from diluting or treating universal waste, except when responding to releases as provided in 40 CFR §273.37; managing specific wastes as provided in 40 CFR §273.33; or crushing lamps under the control conditions of §335.261(e) of this title (relating to Universal Waste Rule)."

(27) In 40 CFR §273.33(a)(3)(i), the reference to "40 CFR parts 260 through 272" and the reference to "40 CFR part 262" are changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(28) In 40 CFR §273.33(c)(2)(iii) and (iv), the references to "40 CFR §262.34" are changed to "§335.69 of this title (relating to Accumulation Time)."

(29) In 40 CFR §273.33(c)(4)(i), the reference, "40 CFR part 261, subpart C," is changed to "Chapter 335, Subchapter R of this title (relating to Waste Classification)."

(30) In 40 CFR §273.33(c)(3)(ii), the reference, "40 CFR parts 260 through 272," is changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(31) In 40 CFR §273.33(d)(1), the phrase "adequate to prevent breakage" is changed to "adequate to prevent breakage, except as specified in §335.261(e) of this title (relating to Universal Waste Rule)."

(32) In 40 CFR §273.37(b), the reference to "40 CFR parts 260 through 272" and the reference to "40 CFR part 262" are changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(33) In 40 CFR §273.40(a), the reference to "40 CFR §§262.53, 262.56(a)(1) through (4), (6), and (b) and 262.57" is changed to "§335.13 of this title (relating to Recordkeeping and Reporting Procedures Applicable to Generators Shipping Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste) and §335.76 of this title (relating to Additional Requirements Applicable to International Shipments)."

(34) In 40 CFR §273.40(b), the reference to "subpart E of part 262 of this chapter" is changed to "§335.13 of this title and §335.76 of this title."

(35) In 40 CFR §273.52(a), the reference to "40 CFR part 262" is changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(36) In 40 CFR §273.52(b), the reference to "40 CFR part 262" is changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(37) In 40 CFR §273.54(b), the reference to "40 CFR parts 260 through 272" and the reference to "40 CFR part 262" are changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(38) In 40 CFR §273.60(a), the reference to "§273.9" is changed to "§335.261(b)(16)(A) of this title (relating to Universal Waste Rule)" and the reference to "parts 264, 265, 266, 268, 270, and 124 of this chapter" is changed to " 30 Texas Administrative Code (relating to Environmental Quality)."

(39) In 40 CFR §273.60(b), the reference to "40 CFR §261.6(c)(2)" is changed to "§335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials)."

(40) In 40 CFR §273.80(a), the reference to "40 CFR §260.20 and §260.23" is changed to "§20.15 of this title (relating to Petition for Adoption of Rules) and §335.261(c) of this title (relating to Universal Waste Rule)."

(41) In 40 CFR §273.80(b), the reference to "40 CFR §260.20(b)" is changed to "§20.15 of this title (relating to Petition for Adoption of Rules)."

(42) In 40 CFR §273.81(a), the reference to "40 CFR §260.10" is changed to "§335.1 of this title (relating to Definitions) and the reference to "§273.9" is changed to "§335.261(b)(16)(F) of this title (relating to Universal Waste Rule)."

(c) Any person seeking to add a hazardous waste or a category of hazardous waste to the universal waste rule may file a petition for rulemaking under this section, §20.15 of this title, and 40 CFR Part 273, Subpart G as adopted by reference in this section.

(1) To be successful, the petitioner must demonstrate to the satisfaction of the commission that regulation under the universal waste rule: is appropriate for the waste or category of waste; will improve management practices for the waste or category of waste; and will improve implementation of the hazardous waste program. The petition must include the information required by §20.15 of this title. The petition should also address as many of the factors listed in 40 CFR §273.81 as are appropriate for the waste or category of waste addressed in the petition.

(2) The commission will grant or deny a petition using the factors listed in 40 CFR §273.81. The decision will be based on the commission's determinations that regulation under the universal waste rule is appropriate for the waste or category of waste, will improve management practices for the waste or category of waste, and will improve implementation of the hazardous waste program.

(3) The commission may request additional information needed to evaluate the merits of the petition.

(d) Any waste not qualifying for management under this section must be managed in accordance with applicable state regulations.

(e) Crushing lamps is permissible only in a crushing system for which the following control conditions are met:

(1) an exposure limit of no more than 0.05 milligrams of mercury per cubic meter is demonstrated through sampling and anal-

ysis using Occupational Safety and Health Administration (OSHA) Method ID-140 or National Institute for Occupational Safety and Health Method Number 6009, based on an eight-hour time-weighted average of samples taken at the breathing zone height near the crushing system operating at the maximum expected level of activity;

(2) compliance with the notification requirements of §106.262 of this title (relating to Facilities (Emission and Distance Limitations) (Previously SE 118)) is demonstrated;

(3) documentation of the demonstrations under paragraphs (1) and (2) of this subsection is provided in a written report to the executive director; and

(4) the executive director approves the crushing system in writing.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 14, 2006.

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Robert Martinez
Acting Director, Environmental Law Division
Texas Commission on Environmental Quality
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Proposal publication date: February 10, 2006
For further information, please call: (512) 239-0177

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 65. WILDLIFE

SUBCHAPTER N. MIGRATORY GAME BIRD PROCLAMATION

31 TAC §65.315, §65.319

The Texas Parks and Wildlife Commission adopts amendments to §65.315 and §65.319, concerning the Migratory Game Bird Proclamation, without changes to the proposed text as published in the June 2, 2006, issue of the *Texas Register* (31 TexReg 4570).

The amendment to §65.315, concerning Open Seasons and Bag and Possession Limits--Early Season Species, adjusts the season dates for early-season species of migratory game birds to account for calendar-shift (to ensure that each season begins on the desired day of the week). The amendment also implements a 16-day teal season, which was approved by the U.S. Fish and Wildlife Service (Service).

The amendment to §65.319, concerning Extended Falconry Season--Early Season Species, adjusts season dates for the take of early-season species of migratory game birds by means of falconry to reflect calendar shift.

The proposed amendments are generally necessary to implement commission policy to provide the greatest hunter opportunity possible, consistent with hunter preference for season starting dates and segment lengths, under frameworks issued by the Service.

The amendment to §65.315, concerning Open Seasons and Bag and Possession Limits--Early Season Species, will function by establishing the season dates for early-season species of migratory game birds.

The amendment to §65.319, concerning Extended Falconry Season--Early Season Species, will function by establishing season dates for the take of early-season species of migratory game birds by means of falconry.

The department received seven comments opposing adoption of the portion of §65.315 affecting dove seasons. Of those seven comments, five expressed a reason or rationale for opposing adoption. The comments, and the agency's response, are as follows.

One commenter opposed adoption of the proposed amendment and stated that three million doves are illegally killed each season because of 'double-bagging' (taking more than the bag limit) and that lawful shooting hours should be from noon to sunset. The department disagrees with the comment and responds that there is no biological evidence that full-day hunting is detrimental to dove populations; that repeated surveys have indicated high hunter preference for full-day hunting; and that full-day hunting is clearly the better choice in terms of providing the greatest hunter opportunity. No changes were made as a result of the comment.

One commenter opposed adoption of the proposed amendment and stated that the bulk of migratory doves seem to appear in southeast Texas in early December, after the season has closed, but that by the time the winter segment opens in late December, the birds usually have moved on further south. The commenter stated that the winter segment in the South Zone therefore should open in early December. The department disagrees with the comment and responds that surveys indicate that hunter and landowner preference is for a winter segment that begins after Christmas. The department also notes that it is the policy of the Texas Parks and Wildlife Commission to provide the greatest amount of hunting opportunity possible and to encourage youth and family hunting activities. Opening the winter segment the day after Christmas provides the greatest opportunity for family and youth hunting activities because children are typically out of school and families are home for the holidays. No changes were made as a result of the comment.

One commenter opposed adoption of the proposed amendment and stated that there should be a winter segment in the North Zone. The department disagrees with the comment and responds that hunter surveys indicate that a shorter season and higher bag limit is preferred by hunters in the North Zone. No changes were made as a result of the comment.

One commenter opposed adoption of the proposed amendment and stated that opening day should be on a Saturday or Sunday. The department disagrees with the comment and responds that hunter preference is for the earliest possible opener allowed under federal frameworks, which is September 1, irrespective of the day of the week it may fall on. No changes were made as a result of the comment.

One commenter opposed adoption of the proposed amendment and stated that there were not enough doves in Karnes County and that therefore the season should be longer. The department disagrees with the comment and responds that the current winter

segment is favored by a majority of hunters and landowners in the South Zone.

The department received 39 comments supporting adoption of the proposed amendment.

The department received no comments opposing adoption of the portion of proposed §65.315 concerning rail seasons.

The department received 10 comments supporting adoption of the proposed amendment.

The department received no comments opposing adoption of the portion of proposed §65.315 concerning gallinule seasons.

The department received five comments supporting adoption of the proposed amendment.

The department received three comments opposing adoption of the portion of proposed §65.315 concerning teal seasons. Of those three comments, two expressed a reason or rationale for opposing adoption. The comments, and the agency's response, are as follows.

One commenter opposed adoption of the proposed amendment and stated that the bag limit should be five or six, like the regular season. The department disagrees with the comment and responds that the bag limit for teal is the maximum allowed under federal frameworks issued by the Service. No changes were made as a result of the comment.

One commenter opposed adoption of the proposed amendment and stated that the Service would not allow a season of greater than 14 days. The department disagrees with the comment and responds that the Service has authorized a 16-day teal season. No changes were made as a result of the comments.

The department received 39 comments supporting adoption of the proposed amendment.

The department received no comments opposing adoption of the portion of proposed §65.315 concerning woodcock seasons.

The department received nine comments supporting adoption of the proposed amendment.

The department received no comments opposing adoption of the portion of proposed §65.315 concerning snipe seasons.

The department received 13 comments supporting adoption of the proposed amendment.

The department received no comments concerning adoption of the proposed amendment to §65.319, concerning Extended Falconry Season--Early Season Species.

The department received no comments from any groups or associations concerning adoption of the proposed amendments.

The amendments are adopted under Parks and Wildlife Code, Chapter 64, which authorizes the commission and the executive director to provide the open season and means, methods, and devices for the hunting and possessing of migratory game birds.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 12, 2006.

TRD-200603698

Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: August 1, 2006
Proposal publication date: June 2, 2006
For further information, please call: (512) 389-4775

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 151. GENERAL PROVISIONS

37 TAC §151.6

The Texas Board of Criminal Justice adopts amendments to Title 37, Part 6, Chapter 151, §151.6, concerning Petition for the Adoption of a Rule, with changes to the text as proposed in the May 12, 2006, issue of the *Texas Register* (31 TexReg 3847).

These revisions are necessary to conform to state law and add clarity.

No comments were received regarding the proposal.

The amendments are adopted under Texas Government Code, §2001.021.

Cross Reference to Statutes: Texas Government Code, Chapter 2001.

§151.6. Petition for the Adoption of a Rule.

(a) Submission of the petition.

(1) Any person may petition a State Agency to adopt a rule as defined by the Texas Administrative Procedure Act, Chapter 2001 of the Texas Government Code.

(2) A petition for a rule under Title 37 of the Texas Administrative Code shall be mailed or delivered to the General Counsel of Texas Department of Criminal Justice (TDCJ or the Agency) at P.O. Box 13084, Austin, Texas 78711.

(3) The petition shall be in writing, shall contain the petitioner's name and address, and shall describe the rule and the reason for making such petition. If the General Counsel determines that further information is necessary to assist the Agency in reaching a decision, the General Counsel may require that the petitioner resubmit the petition and that it contain:

(A) a brief explanation of the proposed rule;

(B) the text of the proposed rule prepared in a manner to indicate the words to be added or deleted from the current text, if any;

(C) a statement of the statutory or other authority under which the rule is to be promulgated;

(D) whether there will be an economic impact on persons required to comply with the proposed rule;

(E) whether the proposed rule will have an effect on small or micro businesses; and

(F) the public benefit anticipated as a result of adopting the rule or the anticipated injury of inequity that could result from the failure to adopt the proposed rule.

(b) Consideration and disposition of the petition.

(1) Except as provided in subsection (c) of this section, the Agency shall consider and dispose of all petitions submitted.

(2) Within 60 days after receipt of the petition by the General Counsel, or within 60 days after receipt by the General Counsel of a resubmitted petition in accordance with subsection (a)(3) of this section, the Agency shall deny the petition or institute rulemaking procedures in accordance with established Agency procedures and the Texas Administrative Procedure Act. The Agency may deny parts of the petition or institute rulemaking procedures on parts of the petition.

(3) If the Agency denies the petition, the General Counsel shall give the petitioner written notice of the Agency's denial and the reasons for the denial.

(c) Subsequent petitions to adopt the same or similar rule. The General Counsel may refuse to consider any subsequent petition for the adoption of the same or similar rule submitted within six months after the date of the initial petition.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 11, 2006.

TRD-200603692
Melinda H. Bozarth
General Counsel
Texas Department of Criminal Justice
Effective date: July 31, 2006
Proposal publication date: May 12, 2006
For further information, please call: (512) 463-0422

♦ ♦ ♦

37 TAC §151.55

The Texas Board of Criminal Justice adopts amendments to Title 37, Part 6, Chapter 151, §151.55, concerning Disposal of Surplus Agricultural Goods and Agricultural Personal Property without changes to the text as proposed in the May 12, 2006, issue of the *Texas Register* (31 TexReg 3848).

These revisions are necessary to conform to existing organizational structure and law.

No comments were received regarding the proposal.

The amendments are adopted under Texas Government Code, §497.113.

Cross Reference to Statutes: Texas Government Code, Chapter 497.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 11, 2006.

TRD-200603693
Melinda H. Bozarth
General Counsel
Texas Department of Criminal Justice
Effective date: July 31, 2006
Proposal publication date: May 12, 2006
For further information, please call: (512) 463-0422

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Department of Banking

Title 7, Part 2

On behalf of the Finance Commission of Texas (commission), the Texas Department of Banking files this notice of intention to review and consider for readoption, revision, or repeal, Texas Administrative Code, Title 7, Chapter 11 (Miscellaneous), specifically §11.37, concerning providing information to consumers on how to file complaints.

The review is conducted pursuant to Government Code, §2001.039. The department on behalf of the commission will accept comments for 30 days following the publication of this notice in the *Texas Register* as to whether the reasons for adopting the section under review continue to exist.

Any questions or written comments pertaining to this notice of intention to review should be directed to Robert Giddings, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705, or by e-mail to robert.giddings@banking.state.tx.us.

The department also invites your comments on how to make these sections easier to understand. For example:

*Does the section organize the material to suit your needs? If not, how could the material be better organized?

*Does the section clearly state its requirements? If not, how could the section be more clearly stated?

*Does the section contain technical language or jargon that is not clear? If so, what language requires clarification?

*Would a different format make the section easier to understand? If so, what changes to the format would ease understanding?

Any proposed changes to this section as a result of the rule review will be published as a proposed rule in the *Texas Register*. A proposed rule is subject to public comment for a reasonable period prior to final adoption by the commission.

TRD-200603736
Sarah J. Shirley
General Counsel
Texas Department of Banking
Filed: July 13, 2006

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On behalf of the Finance Commission of Texas (commission), the Texas Department of Banking (department) files this notice of intention to review and consider for readoption, revision, or repeal, Texas Administrative Code, Title 7, Chapter 26 (Perpetual Care Cemeteries), specifically §26.1, concerning perpetual care cemetery fees; §26.2, concerning records; §26.3, concerning written notice to prohibit interment of a homicide perpetrator in the same perpetual care cemetery as the homicide victim; §26.4, concerning ordering and setting burial markers or monuments; §26.11, concerning providing information to consumers on how to file complaints; and §26.12, concerning responding to written consumer complaints.

The review is conducted pursuant to Government Code, §2001.039. The department on behalf of the commission will accept comments for 30 days following the publication of this notice in the *Texas Register* as to whether the reasons for adopting the sections under review continue to exist.

Any questions or written comments pertaining to this notice of intention to review should be directed to Sarah J. Shirley, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705, or by e-mail to sarah.shirley@banking.state.tx.us.

The department also invites your comments on how to make these sections easier to understand. For example:

*Do the sections organize the material to suit your needs? If not, how could the material be better organized?

*Do the sections clearly state the requirements? If not, how could any section be more clearly stated?

*Do the sections contain technical language or jargon that is not clear? If so, what language requires clarification?

*Would a different format (grouping and order of sections, use of headings, paragraphing) make the sections easier to understand? If so, what changes to the format would ease understanding?

*Would dividing any section into two or more shorter sections be better? If so, what sections should be changed?

Any proposed changes to these sections as a result of the rule review will be published as proposed rules in the *Texas Register*. Proposed rules are subject to public comment for a reasonable period prior to final adoption by the commission.

TRD-200603734
Sarah J. Shirley
General Counsel
Texas Department of Banking
Filed: July 13, 2006

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On behalf of the Finance Commission of Texas (commission), the Texas Department of Banking files this notice of intention to review and consider for readoption, revision, or repeal, Texas Administrative Code, Title 7, Chapter 27 (Applications), specifically §27.1, concerning notices to applicants, application processing times, and appeals.

The review is conducted pursuant to Government Code, §2001.039. The department on behalf of the commission will accept comments for 30 days following the publication of this notice in the *Texas Register* as to whether the reasons for adopting the section under review continue to exist.

Any questions or written comments pertaining to this notice of intention to review should be directed to Robert Giddings, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705, or by e-mail to robert.giddings@banking.state.tx.us.

The department also invites your comments on how to make these sections easier to understand. For example:

*Does the section organize the material to suit your needs? If not, how could the material be better organized?

*Does the section clearly state its requirements? If not, how could the section be more clearly stated?

*Does the section contain technical language or jargon that is not clear? If so, what language requires clarification?

*Would a different format make the section easier to understand? If so, what changes to the format would ease understanding?

Any proposed changes to this section as a result of the rule review will be published as a proposed rule in the *Texas Register*. A proposed rule is subject to public comment for a reasonable period prior to final adoption by the commission.

TRD-200603733
Sarah J. Shirley
General Counsel
Texas Department of Banking
Filed: July 13, 2006

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On behalf of the Finance Commission of Texas (commission), the Texas Department of Banking (department) files this notice of intention to review and consider for readoption, revision, or repeal, Texas Administrative Code, Title 7, Chapter 31 (Private Child Support Enforcement Agencies), specifically Subchapter A, comprised of §31.1, concerning definitions; Subchapter B, comprised of §§31.11 - 31.19, concerning how to register an agency; Subchapter C, comprised of §§31.31 - 31.39, concerning an agency's responsibilities after registration; Subchapter D, comprised of §§31.51 - 31.56, concerning regulatory requirements applicable to agency operations; Subchapter E, comprised of §§31.71 - 31.76, concerning how the department exercises its enforcement authority; Subchapter F, comprised of §§31.91 - 31.96, concerning foreign agencies registered in other states; and Subchapter G, comprised of §§31.111 - 31.115, concerning civil remedies.

The review is conducted pursuant to Government Code, §2001.039. The department on behalf of the commission will accept comments for 30 days following the publication of this notice in the *Texas Register* as to whether the reasons for adopting the sections under review continue to exist.

Any questions or written comments pertaining to this notice of intention to review should be directed to Shannon Phillips, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705, or by e-mail to shannon.phillips@banking.state.tx.us.

The department also invites your comments on how to make these sections easier to understand. For example:

*Do the sections organize the material to suit your needs? If not, how could the material be better organized?

*Do the sections clearly state the requirements? If not, how could any section be more clearly stated?

*Do the sections contain technical language or jargon that is not clear? If so, what language requires clarification?

*Would a different format (grouping and order of sections, use of headings, paragraphing) make the sections easier to understand? If so, what changes to the format would ease understanding?

*Would dividing any section into two or more shorter sections be better? If so, what sections should be changed?

Any proposed changes to these sections as a result of the rule review will be published as proposed rules in the *Texas Register*. Proposed rules are subject to public comment for a reasonable period prior to final adoption by the commission.

TRD-200603732
Sarah J. Shirley
General Counsel
Texas Department of Banking
Filed: July 13, 2006

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Texas Department of Criminal Justice

Title 37, Part 6

The Texas Board of Criminal Justice files this notice of intent to review and revise Title 37, Part 6, Chapter 151 General Provisions, §151.51, Custodial Officer Certification and Hazardous Duty Pay Eligibility Guidelines.

This review is being conducted pursuant to Texas Government Code §2001.039 which requires rule review every four years. The proposed revisions are necessary to correct job titles and statutory cites.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P. O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this rule review.

TRD-200603730
Melinda Bozarth
General Counsel
Texas Department of Criminal Justice
Filed: July 13, 2006

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The Texas Board of Criminal Justice files this notice of intent to review and revise Title 37, Part 6, Chapter 163 Community Justice Assistance Division Standards, §163.25, Community Justice Councils, Tasks, and Plans.

This review is being conducted pursuant to Texas Government Code §2001.039 which requires rule review every four years. The proposed revisions are necessary to conform to state law.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P. O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this rule review.

TRD-200603738
Melinda Bozarth
General Counsel
Texas Department of Criminal Justice
Filed: July 13, 2006

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Texas Education Agency

Title 19, Part 2

The State Board of Education (SBOE) proposes the review of 19 TAC Chapter 61, School Districts, pursuant to the Texas Government Code, §2001.039. The rules being reviewed by the SBOE in 19 TAC Chapter 61 are organized under the following subchapter: Subchapter A, Board of Trustees Relationship.

As required by the Texas Government Code, §2001.039, the SBOE will accept comments as to whether the reasons for adopting 19 TAC Chapter 61, Subchapter A, continue to exist.

Comments or questions regarding this rule review may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494, (512) 475-1497. Comments may also be submitted electronically to rules@tea.state.tx.us or faxed to (512) 463-0028.

TRD-200603770
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: July 17, 2006

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The Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 61, School Districts, pursuant to the Texas Government Code, §2001.039. The rules being reviewed by the TEA in 19 TAC Chapter 61 are organized under the following subchapters: Subchapter AA, Commissioner's Rules on School Finance; Subchapter BB, Commissioner's Rules on Reporting Requirements; Subchapter CC, Commissioner's Rules Concerning School Facilities; Subchapter DD, Commissioner's Rules Concerning Missing Child Prevention and Identification Programs; Subchapter EE, Commissioner's Rules on Reporting Child Abuse and Neglect; Subchapter FF, Commissioner's Rules Concerning High School Diplomas for Certain Veterans; Subchapter GG, Commissioner's Rules Concerning Counseling Public School Students; and Subchapter HH, Commissioner's Rules Concerning Classroom Supply Reimbursement Program.

As required by the Texas Government Code, §2001.039, the TEA will accept comments as to whether the reasons for adopting 19 TAC Chapter 61, Subchapters AA - HH, continue to exist.

The public comment period on the review of 19 TAC Chapter 61, Subchapters AA - HH, begins July 28, 2006, and ends August 27, 2006. Comments or questions regarding this rule review may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494, (512) 475-1497. Comments may also be submitted electronically to rules@tea.state.tx.us or faxed to (512) 463-0028.

TRD-200603771
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: July 17, 2006

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Adopted Rule Reviews

Texas Department of Licensing and Regulation

Title 16, Part 4

The Texas Department of Licensing and Regulation (Department) readopts the administrative rules of 16 TAC Chapter 66, Registration of Property Tax Consultants in accordance with the Texas Government Code, §2001.039. The Notice of Intent to Review was published in the March 31, 2006, issue of the *Texas Register* (31 TexReg 2883).

In accordance with the requirements of Texas Government Code, §2001.039, the Department reviewed the administrative rules of TAC Chapter 66, Registration of Property Tax Consultants to determine if the rules were obsolete, reflected current legal and policy considerations and reflected current procedures of the Department.

The Department's review has determined that the reasons for initially adopting the rules continue to exist. The rules are still essential in implementing the provisions of the Texas Occupations Code, Chapter 51 and 1152. Based on the Department's review, however, the Department proposes that amendments be made which may be helpful in clarifying statutory and administrative rule requirements and bring them more in line with current law and Department procedure.

Proposed changes will be published in the Proposed Rule Section of the *Texas Register* and will be open for public comment prior to final adoption or repeal by the Commission in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

The Notice of Intent to Review was distributed to persons internal and external to the agency. The public comment period closed May 1, 2006. No public comments were received.

The rules are re-adopted in accordance with Texas Government Code, §2001.039. This concludes the review of 16 TAC Chapter 66.

TRD-200603779
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: July 17, 2006

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The Texas Department of Licensing and Regulation (the Department) filed a notice of intent to review and consider for re-adoption, revision, or repeal, Title 16, Texas Administrative Code, Chapter 80, Licensed Court Interpreters in accordance with the requirements of Texas Government Code, §2001.039. The Notice of Intent to Review was published in the March 31, 2006, issue of the *Texas Register* (31 TexReg 2883).

In accordance with the requirements of Texas Government Code, §2001.039, the Department reviewed the administrative rules of 16 TAC Chapter 80, Licensed Court Interpreters, to determine if the rules were obsolete, reflect current legal and policy considerations, and reflect current procedures of the Department.

The Department's review determined that the reasons for initially adopting the rules continue to exist. The rules continue to be essential in implementing the provisions of Texas Government Code, Chapter

57; and the Department recommends to the Texas Commission of Licensing and Regulation (Commission) the re-adoption of Chapter 80. Based on the Department's review, however, the Department proposes that amendments be made which may be helpful in clarifying statutory and administrative rule requirements and bring them more in line with current law and Department procedures.

Proposed changes to these rules as a result of the rule review will be published in the Proposed Rules Section of the *Texas Register*. The proposed rules will be open for public comment prior to final adoption or repeal by the Commission in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

The Notice of Intent to Review was published in the March 31, 2006, issue of the *Texas Register* and distributed to persons internal and external to the agency. The public comment period closed on May 1, 2006. Four comments were received in response to the Notice of Intent to Review.

Three of the commenters urged the repeal of the license requirement for interpreters. Making this change would require action by the Texas Legislature and thus will not be addressed as part of the Department's rule review. One commenter suggested postponing the effective date of the continuing education requirement. The Department is considering whether to file proposed rules to delay the continuing education requirement.

The rules are re-adopted by the Commission in accordance with Texas Government Code, §2001.039. This concludes the review of 16 TAC, Chapter 80, Licensed Court Interpreters.

TRD-200603780
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: July 17, 2006

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 16 TAC §25.43(f)(1)(A)

Standard Terms of Service

[Insert POLR Provider Name] (Certificate No. ____)
Provider of Last Resort (POLR) Residential Service

This Standard Terms of Service applies to residential customers receiving Provider of Last Resort (POLR) service from [*insert POLR Provider name*] under Public Utility Commission of Texas (PUCT) Retail Electric Provider (REP) Certificate No. ____. These Standard Terms of Service are subject to current and future customer protection laws or rules as prescribed by local, state or federal authorities and to changes in applicable charges or transmission and distribution service provider (TDSP) rates. Customers will be notified of material changes in these Standard Terms of Service resulting from changes in local, state or federal legislation or rules, applicable charges, or TDSP rates, at least 45 calendar days before such changes take effect unless otherwise directed by law. Each Standard Terms of Service will be given a unique version number for quick reference.

SPANISH LANGUAGE (IDIOMA ESPANOL) Si usted quiere obtener el mismo documento impreso detallando los Términos de Servicio en español comunicandose con nosotros al [*insert toll-free number*].

1. PRICE FOR BASIC FIRM SERVICE

POLR Provider will provide basic firm service, defined as electric service not subject to interruption for economic reasons and that does not include value-added options offered in the competitive market. The rate for your electric service from POLR Provider will be based on the formula detailed below. These charges may be applied in a pay-in-advance manner as described in section 2 **SECURITY AND BILLING**.] Non-recurring charges (i.e., charges not occurring every month) will be billed as they are incurred and are set out in section 3 **SERVICE CHARGES AND FEES,** below.

Your rate for POLR service will be derived from the following formula:

POLR rate (in $ per kWh) = (Non-bypassable charges + POLR customer charge + POLR energy charge) / kWh used

Where:

(i) Non-bypassable charges shall be all TDU and other non-bypassable charges and credits for the appropriate customer class in the applicable service territory, including ERCOT administrative charges, nodal fees or surcharges, replacement reserve charges attributable to POLR load, and applicable taxes from various taxing or regulatory authorities, multiplied by the level of kWh and KW used, where appropriate.

(ii) POLR customer charge shall be $0.06 per kWh.

(iii) POLR energy charge shall be the sum over the billing period of the actual hourly MCPEs for the customer multiplied by the level of kWh used, multiplied by 130%.

(iv) "Actual hourly MCPE" is an hourly rate based on a simple average of the actual interval MCPE prices over the hour.

(v) "Level of kWh used" is based either on interval data or on an allocation of the customer's total actual usage to the hour based on a ratio of the sum of the ERCOT backcasted profile interval usage data over the hour to the total of the ERCOT backcasted profile interval usage data over the customer's entire billing period.

(vi) For each billing period, if the sum over the billing period of the actual hourly MCPEs for a customer multiplied by the level of kWh used falls below the simple average of the zonal MCPE prices over the 12-month period ending September 1 of the preceding year multiplied by the total kWh used over the customer's billing period, then the POLR energy charge shall be the simple average of the zonal MCPE prices over the 12-month period ending September 1 of the preceding year multiplied by the total kWh used over the customer's billing period multiplied by 130%. This methodology shall apply until the

commission issues an order suspending or modifying the operation of the floor after conducting an investigation.

2. SECURITY AND BILLING

[PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN STANDARD TERMS OF SERVICE AT THE OPTION OF THE POLR PROVIDER:

POLR Provider will offer the option to either pay a cash deposit to prevent disconnection after POLR provider has begun providing your electric service, pursuant to subsection (a) **TRADITIONAL CASH DEPOSIT** below or to choose **PAY-IN-ADVANCE BILLING OPTION IN LIEU OF CASH DEPOSIT** pursuant to subsection (b) below.]

POLR Provider shall not require a cash deposit if you are able to provide the POLR Provider with a Credit Reference Letter that includes the following representations: 1) you have been a customer of any retail electric provider or the electric utility (prior to 2002) within the two years prior to your request for electric service; 2) you are not delinquent in payment of any such electric service account; and 3) you were not late in paying a bill more than once during the last 12 consecutive months.

A residential customer shall also be deemed as having established satisfactory credit and shall not be required to pay a cash deposit if the customer possesses a satisfactory credit rating obtained through an accredited credit reporting agency.

If these conditions do not apply, POLR Provider may require a cash deposit unless you can demonstrate to the POLR Provider any of the following prior to the due date of the cash deposit: 1) you are 65 years of age or older and your account with any retail electric provider or the electric utility (prior to 2002) has not had a delinquent balance within the last 12 months for the same type of service; 2) you are a victim of family violence as defined by the Texas Family Code § 71.004, by a family violence center, or by treating medical personnel;* or 3) you are medically indigent.**

*This determination shall be evidenced by submission of a certification letter developed by the Texas Council on Family Violence. The certification letter may be submitted directly by use of the toll-free fax number listed below to POLR Provider.

** To be considered medically indigent, the customer must make a demonstration that the following criteria are met: the customer's household income must be at or below 150% of the poverty guidelines as certified by a governmental entity or government funded energy assistance program provider, and either of the following must apply: (i) the customer or the customer's spouse has been certified by that person's physician (for the purposes of this subsection, the term "physician" shall mean any medical doctor, doctor of osteopathy, nurse practitioner, registered nurse, state-licensed social worker, state-licensed physical and occupational therapist, and an employee of an agency certified to provide home health services pursuant to 42 U.S.C. §1395 et seq as being unable to perform three or more activities of daily living, as defined in Title 22, Texas Administrative Code, Section 218.2, or (ii) the customer's monthly out-of-pocket medical expenses exceed 20% of the household's gross income.

a) TRADITIONAL CASH DEPOSIT

1) Your cash deposit, if required, will be based on one-sixth (1/6) of your estimated annual billing. You may also be required, in the future, to pay an additional cash deposit if you have been issued a disconnection notice within the last 12 months or if you have been a customer for 12 months and your billings are more than twice the amount estimated to determine your cash deposit. Instead of an additional cash deposit, you may pay the total amount due by the due date of the bill, provided you have not exercised this option in the previous 12 months.
2) Your total cash deposit shall not exceed an amount equivalent to one-sixth (1/6) of your estimated annual billing.

3) POLR Provider may require payment of a cash deposit within ten calendar days of receiving confirmation from the Registration Agent of the effective date you become a customer of the POLR.
4) A customer who has applied for or is enrolled currently in LITE UP Texas (Low Income Telephone and Electric Utilities Program) may pay the initial cash deposit to POLR Provider in two installments. The first installment shall not exceed the estimated billing for the next month or one-twelfth (1/12) of the estimated annual billing and shall be due within ten calendar days of POLR Provider's issuance of the written notice requiring the cash deposit. The second installment for the remainder of the cash deposit shall be due within 40 calendar days of the issuance of the original written notice. For more information regarding LITE UP Texas, contact POLR Provider or call toll-free 1-866-4-LITE-UP (1-866-454-8387) to determine eligibility or to receive an application.
5) A written letter of guarantee may be used in lieu of paying a cash deposit. The guarantor must become or remain a customer of the POLR or its affiliated REP for the term in which the guarantee is in effect. If the guarantor fails to become, or ceases to be, a customer of the POLR or its affiliated REP, the POLR may require the customer to pay the initial or additional cash deposit as a condition of continuing the contract for service.
6) Upon default by a residential customer, the guarantor of the customer's account shall be responsible for the unpaid balance of the account only up to the agreed amount in the letter of guarantee. The POLR, or its affiliated REP shall provide written notification to the guarantor of the customer's default, the amount owed by the guarantor, and the due date for the amount owed. The guarantor will have 16 calendar days from the date the notice is issued to pay the amount owed on the defaulted account. If the 16th day falls on a holiday or weekend, the due date shall be the next business day. The POLR or its affiliated REP may transfer the amount owed on the defaulted account to the guarantor's own electric service bill provided the guaranteed amount owed is identified separately on the bill.
7) The POLR or its affiliated REP may initiate disconnection of service to the guarantor for nonpayment of the guaranteed amount within ten calendar days of issuance of a notice of disconnection.
8) Your service may be disconnected for failure to pay a required cash deposit within ten calendar days of issuance of a notice of disconnection of service.
9) A disconnection notice may be issued concurrently with either the written request for the cash deposit or current monthly bill for electric service. Disconnection means a physical interruption of electric service.
10) You will accrue interest on your cash deposit(s) with POLR Provider. Each year in December, the PUCT establishes the interest rate POLR Provider will apply to your cash deposit for the next calendar year.
11) Your cash deposit and accrued interest, less any outstanding balance owed for electric service, will be refunded to you upon closing of your account with POLR Provider.
12) Your cash deposit and accrued interest will be refunded if you pay your bills for 12 consecutive months without your service being disconnected for nonpayment and without having more than two delinquent payments.
13) The guarantee agreement will be terminated if you pay your bills for 12 consecutive months without your service being disconnected for nonpayment and without having more than two delinquent payments within the last 12 months.

b) [*PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN STANDARD TERMS OF SERVICE AT THE OPTION OF POLR PROVIDER]* PAY-IN-ADVANCE BILLING OPTION IN LIEU OF CASH DEPOSIT

1) If you select the pay-in-advance option, you will be billed in advance for your electric service after POLR Provider receives confirmation from the Registration Agent of the effective date you are to become a POLR customer of POLR Provider. All bills, except the initial one requesting your payment in advance, will include, where applicable, the monthly charge, energy charge, non-bypassable charges, applicable taxes, service charges and other costs as permitted by governmental or regulatory authorities.
2) Your initial pay-in-advance billing will include charges for two months average kilowatt hour (kWh) consumption during the prior year and will include, where applicable, applicable taxes, service charges

and other costs as permitted by governmental or regulatory authorities. The pay-in-advance amount will be used in lieu of the cash deposit and will be no greater than $200 or less than $75. The initial pay-in-advance option in lieu of cash deposit will be due within ten calendar days of issuance of a notice requiring a pay-in-advance billing.

3) Pay-in-advance billing requires that you maintain a balance of the two months initial total estimated charges for the time that you are a POLR customer and will be billed monthly on approximately 30-day periods.
4) Your bill will be due upon receipt and will be considered delinquent if it is not paid by the 16th calendar day after issuance of the bill.
5) If your pay-in-advance billing exceeds the initial pay-in-advance amount, then the pay-in-advance billing amount will be reset to the highest amount for the next billing cycle.
6) There is no interest accrued on pay-in-advance billing.
7) If historical usage is not available, POLR Provider in its sole judgment may develop reasonable good faith estimates to determine your billing and establish a pay-in-advance billing amount accordingly. Estimates will be based on key energy determinants such as square footage, and HVAC type and size. Once there is an established history of six months usage, POLR Provider will review the pay-in-advance amount and adjust it, if necessary.
8) Billing statements will reflect the total charges for POLR services provided by POLR Provider.
9) Your service may be disconnected if you fail to pay the required pay-in-advance bill within ten calendar days of issuance of a notice of disconnection of service.
10) A disconnection notice may be issued concurrently with the written request for the required pay-in-advance bill.

c) **BILLING**

1) You will be billed monthly for your electric service.
2) Your monthly billing period will be approximately 30 calendar days.
3) You will be billed monthly after your scheduled monthly meter read date. Billing statements will reflect the total charges for POLR services provided by POLR Provider.
4) Your bill will be due upon receipt and will be considered delinquent if it is not paid by the 16th day after issuance of the bill.
5) POLR Provider offers deferred and level payment (also known as budget) plans. Budget plans will be reconciled quarterly. Please contact POLR Provider at the 24-hour customer service number below for information about these options.

3. SERVICE CHARGES AND FEES

You will be subject to the following charges and fees in addition to the **PRICE FOR BASIC SERVICE** in section 1:

Service Charges and Fees	**Amount**
Account History charge if you request and are provided a premise usage history for more than the most recent 12 months or if a 12-month history is requested more than once within a 12-month period. If you are a low-income customer, the first two premise usage histories provided on your behalf to an agency providing bill payment assistance shall not be counted in determining whether you are subject to an account history charge.	$25.00
Collection Letter charge for processing a registered or certified letter demanding payment of past due accounts.	$15.00
Disconnection charge for disconnection of service pursuant to TDSP's tariffs.	[Insert pass through charge from TDSP]

Service Charges and Fees	Amount
Account Reinstatement fee for handling accounts for reconnection after disconnection for non-payment (in addition to any applicable disconnect or reconnect charges).	No charge
Equipment charge for providing testing, monitoring or other special equipment at the request of the customer.	[Insert pass through charge from TDSP]
Reconnection charge for reconnection of service pursuant to TDSP's tariffs.	[Insert pass through charge from TDSP]
Unmetered Guardlight/Security lighting charge applies to existing guardlights.	[Insert applicable $/kWh charge equivalent to 125% of former applicable PTB]
Late fees will be assessed on delinquent deferred payment arrangements. Deferred payment arrangements are delinquent if not paid by the date specified by the deferred payment plan.	5% assessed on the late deferred payment amount
Out-of-cycle meter reading charge may be charged if you request an out-of-cycle meter reading:	
During regular hours	[Insert pass through charge from TDSP]
Outside regular working hours – Non-holiday	[Insert pass through charge from TDSP]
Outside regular working hours – Holidays	[Insert pass through charge from TDSP]
Reread charge will be assessed if requested by the customer.	[Insert pass through charge from TDSP]
Return check charge for each check returned for insufficient funds.	$25.00
Tampering charge for unauthorized reconnection of service, tampering with the electric meter, theft of electric service by any person on customer's premise, or evidence thereof, at customer's premise. Additional charges for repair, replacement, relocation of equipment and estimated amount of electric service not recorded may also be billed to you.	[Insert pass through charge from TDSP]
Disconnection Reminder Notification charge for notifying customer that disconnection of service may be in progress. This notification may be made by telephone, electronically or by any means of communication appropriate for the customer.	$5.00
POLR Provider reserves the right to charge for court costs, legal fees, and other costs associated with collection of delinquent amounts.	
POLR Provider reserves the right to charge for services requested by you that are rendered on your behalf after your approval of disclosed charges for those services, as well as the right to pass through tariff charges for services rendered by the TDSP.	

4. DISCONNECTION OF SERVICE

Disconnection means a physical interruption of electric service. Disconnection is subject to the rules of the PUCT.

a) Your account will be considered delinquent if your monthly bill or pay-in-advance bill is not paid on or before the 16th day after issuance of the bill. If your account becomes delinquent, your service may be disconnected ten calendar days after notice is issued.
b) Your service may be disconnected after you are notified of your failure to comply with the terms of this Standard Terms of Service or any payment plan.
c) Service may not be reconnected by the POLR Provider until all delinquent amounts and charges owed to POLR Provider have been paid and credit has been re-established.
d) Your service may be disconnected without notice if a dangerous or hazardous condition exists, if the service has been connected without proper authority or for the reasons prescribed in the PUCT substantive rules. Service will not be reconnected until the dangerous or hazardous condition has been corrected.
e) If you choose to cancel service under this Standard Terms of Service, your service will be disconnected unless you have made arrangements with another retail electric provider and a switch of provider has been successfully completed by the Registration Agent by the date you choose to cancel service. You will be responsible for any charges pursuant to section 1 **PRICE FOR BASIC SERVICE,** section 2 **SECURITY AND BILLING** and section 3 **SERVICE CHARGES AND FEES** of this agreement up to the date your service is disconnected.
f) A disconnection notice may be issued concurrently with the written requests for either the cash deposit or with a pay-in-advance in lieu of cash deposit billing.
g) A disconnection notice may be issued concurrently with your bill.
h) You may be disconnected for failure to pay an initial pay-in-advance bill in lieu of cash deposit or a monthly pay-in-advance bill.
i) POLR Provider cannot disconnect your electric service until you are a customer of the POLR Provider.

5. CUSTOMER INFORMATION

You will be required to provide your social security number, a valid driver's license number, or other verifiable means of personal identification.

You authorize the TDSP, any previous retail electric provider, or the Independent Organization to provide POLR Provider information including, but not limited to: previous billings and usage of electricity, meter readings and types of service received, credit history, any records of tampering, and other names in which service has been provided, social security number, contact telephone number(s), driver's license, etc.

You authorize POLR Provider to release your customer payment information to credit reporting agencies, regulatory agents, agents of POLR Provider, energy assistance agencies, law enforcement agencies or the TDSP.

You authorize POLR Provider to use credit-reporting agencies to evaluate your credit history consistent with applicable law.

6. LENGTH OF AGREEMENT

NOTICE: POLR PROVIDER CANNOT REQUIRE THAT YOU SIGN UP FOR A MINIMUM CONTRACT TERM AS A CONDITION OF PROVIDING SERVICE.

No term of service is required under this agreement unless by mutual agreement a term is agreed to in writing between you and POLR Provider or unless you enter a level payment plan or deferred payment plan. If you decide to be placed on POLR Provider's Level or Deferred Payment Plans, you will not be charged a penalty for canceling your service before the end of the term but you will be responsible for all outstanding amounts due, including Level and Deferred Payment Plan reconciliation amounts. If you decide to be placed on POLR Provider's:

a) Level (also known as Budget) Payment Plan, your term of service shall be six months from the date of the first monthly billing subsequent to being placed on the level payment plan. The term shall start on the date you enter the Level Payment Plan; or
b) Deferred Payment Plan, your term of service shall be a minimum of three months or the length agreed to for making deferred payments, whichever is longer. The term shall start on the date you enter the Deferred Payment Plan.

7. END OF POLR TERM

POLR Provider's Standard Terms of Service and obligations to offer the POLR rate specified under section 2, **PRICE FOR BASIC SERVICE**, will expire on [*insert last date of POLR term*]. At least 60 calendar days before that date, POLR Provider will provide you notice of available options for securing electric service after POLR's existing term has expired. If you obtain electric service from a provider other than POLR Provider, your final bill from POLR Provider will be offset against your deposit and any remaining balance will be refunded to you within seven calendar days from the final meter read date.

8. CONTACT INFORMATION

Name of Provider:
Physical Address:

24-Hour Customer Service: (toll free)
24-Hour Power Outages: Contact your local electricity delivery company
Internet web-site:
Fax: (toll free)

You may contact POLR Provider if you have a dispute concerning your bill or your service from POLR Provider. You must provide, in writing, within ten business days of the invoice date, your reasons for disputing the invoice. You will be obligated to pay the undisputed portion of the bill and the POLR may pursue disconnection of service for nonpayment of the undisputed portion after appropriate notice. In the event that you give timely notice of a dispute, you and the POLR Provider shall, for a period of 30 calendar days following POLR Provider's receipt of the notice, pursue diligent, good faith efforts to resolve the dispute. Following resolution of the dispute, any amount found payable by either party shall be paid within ten business days.

Complaints regarding your service may also be directed to the Public Utility Commission of Texas, 1-888-782-8477 (toll free).

9. LOW INCOME PAYMENT ASSISTANCE INFORMATION

Rate discounts and other assistance programs may be available for qualified low-income customers. For more information, contact POLR Provider Customer Service or either of the following state agencies:

Texas Department of Housing and Consumer Affairs:	1-512-475-3800
Public Utility Commission of Texas:	1-888-782-8477 (toll free)

10. BILL PAYMENT METHODS

You may pay for your electric service by personal or cashier's check, money order, debit or credit card, electronic funds transfer, [*Insert if offered by POLR Provider (optional):* in cash through an agent authorized by the POLR Provider], or automatic draft from your financial institution. If you choose to make payment by means of electronic funds transfer or automatic draft, you must contact POLR Provider's Customer Service number to begin those options for bill payment at no cost.

If you have had two or more personal checks returned for insufficient funds within the last 12 months, POLR Provider will require all further payments for electric service to be by cash, cashier's check, money order or

debit/credit card. If you pay by debit/credit card and it has been declined two or more times within the last 12 months, POLR Provider will require all further payments to be by cash, cashier's check or money order.

11. FORCE MAJEURE

POLR Provider shall not be liable in damages for any act or event that is beyond its control including but not limited to, an act of God, act of the public enemy, war, insurrection, riot, fire, explosion, labor disturbance or strike, terrorism, wildlife, accident, breakdown or accident to machinery or equipment, or a valid curtailment order, regulation, or restriction imposed by governmental, military, or lawfully established civilian authorities, including any directive of the independent organization, and performance or nonperformance by the TDSP.

12. LIMITATION OF LIABILITY

POLR PROVIDER DOES NOT GENERATE YOUR ELECTRICITY, NOR DOES POLR PROVIDER TRANSMIT OR DISTRIBUTE ELECTRICITY TO YOU. POLR PROVIDER WILL NOT BE LIABLE FOR FLUCTUATIONS, INTERRUPTIONS OR IRREGULARITIES IN BASIC FIRM SERVICE. LIABILITIES NOT EXCUSED BY REASON OF FORCE MAJEURE OR OTHERWISE SHALL BE LIMITED TO DIRECT, ACTUAL DAMAGES. NEITHER YOU NOR THE POLR PROVIDER SHALL BE LIABLE TO THE OTHER FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY, OR INDIRECT DAMAGES. THESE LIMITATIONS APPLY WITHOUT REGARD TO THE CAUSE OF ANY LIABILITY OR DAMAGE.

13. REPRESENTATIONS AND WARRANTIES

POLR PROVIDER WARRANTS THAT THE ELECTRICITY SOLD UNDER THIS AGREEMENT WILL BE "BASIC FIRM SERVICE" AS THAT TERM IS DEFINED IN PUCT SUBSTANTIVE RULE 25.43(c)(1), TO WIT "ELECTRIC SERVICE NOT SUBJECT TO INTERRUPTION FOR ECONOMIC REASONS AND THAT DOES NOT INCLUDE VALUE ADDED OPTIONS OFFERED IN THE COMPETITIVE MARKET. BASIC FIRM SERVICE EXCLUDES, AMONG OTHER COMPETITIVELY OFFERED OPTIONS, EMERGENCY OR BACK-UP SERVICE, AND STAND-BY SERVICE."

POLR PROVIDER MAKES NO OTHER WARRANTIES WHATSOEVER WITH REGARD TO THE PROVISION OF ELECTRIC SERVICE AND DISCLAIMS ANY AND ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

14. DISCRIMINATION

POLR Provider will not refuse to provide electric service or otherwise discriminate in the provision of electric service to any customer based on race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, disability, familial status, level of income, location of customer in an economically distressed geographic area, or qualification for low-income or energy efficiency services.

You have the right to cancel this agreement (Standard Terms of Service) for electric service without penalty or fee of any kind for a period of three federal business days after you have received the Standard Terms of Service. You may cancel your service and this agreement by calling the toll free 24-hour Customer Service number contained in this Standard Terms of Service or by contacting us through fax or e-mail. ***Cancellation of this agreement will result in disconnection of your service as provided in this agreement.***

Figure: 16 TAC §25.43(f)(1)(B)

Standard Terms of Service

[Insert POLR Provider Name] (Certificate No._____)
Provider of Last Resort (POLR) Small Non-Residential Service

This Standard Terms of Service (STOS) applies to small non-residential customers (i.e., less than 50 kW) receiving Provider of Last Resort (POLR) service from POLR Provider under Public Utility Commission of Texas (PUCT) Retail Electric Provider (REP) Certificate No. ___. These Standard Terms of Service are subject to current and future customer protection laws or rules as prescribed by local, state or federal authorities and to changes in applicable charges or transmission and distribution service provider (TDSP) rates. Customers will be notified of material changes in these Standard Terms of Service resulting from changes in local, state, or federal legislation or rules, applicable charges, or TDSP rates, at least 45 calendar days before such changes take effect, unless otherwise directed by law. Each Standard Terms of Service will be given a unique version number for quick reference.

SPANISH LANGUAGE (IDIOMA ESPANOL) Si usted quiere obtener el mismo documento impreso detallando los Términos de Servicio en español comunicandose con nosotros al [*insert toll-free number*].

1. PRICE FOR BASIC FIRM SERVICE.

POLR Provider will provide basic firm service, defined as electric service not subject to interruption for economic reasons and that does not include value-added options offered in the competitive market. The rate for your electric service from POLR Provider will be based on the formula detailed below. These charges may be applied in a pay-in-advance manner as described in section 2 **SECURITY AND BILLING.**] Non-recurring charges will be billed as they are incurred and are set out in section 3 **SERVICE CHARGES AND FEES** below.

Your rate for POLR service will be derived from the following formula:

POLR rate (in $ per kWh) = (Non-bypassable charges + POLR customer charge + POLR demand charge + POLR energy charge) / kWh used

Where:

(i) Non-bypassable charges shall be all TDU and other non-bypassable charges and credits for the appropriate customer class in the applicable service territory, including ERCOT administrative charges, nodal fees or surcharges, replacement reserve charges attributable to POLR load, and applicable taxes from various taxing or regulatory authorities, multiplied by the level of kWh and KW used, where appropriate.

(ii) POLR customer charge shall be $0.025 per kWh.

(iii) POLR demand charge shall be $2.00 per kW, per month, for customers that have a demand meter, and $50.00 per month for customers that do not have a demand meter.

(iv) POLR energy charge shall be the sum over the billing period of the actual hourly MCPEs, for the customer multiplied by the level of kWh used, multiplied by 130%, multiplied by the level of kWh used.

(v) "Actual hourly MCPE" is an hourly rate based on a simple average of the actual interval MCPE prices over the hour.

(vi) "Level of kWh used" is based either on interval data or on an allocation of the customer's total actual usage to the hour based on a ratio of the sum of the ERCOT backcasted profile interval usage data over the hour to the total of the ERCOT backcasted profile interval usage data over the customer's entire billing period.

(vi) For each billing period, if the sum over the billing period of the actual hourly MCPEs for a customer multiplied by the level of kWh used falls below the simple average of the zonal MCPE prices over the 12-month period ending September 1 of the preceding year multiplied by the total kWh used over the customer's billing period, then the POLR energy charge shall be the simple average of the zonal MCPE prices over the 12-month

period ending September 1 of the preceding year multiplied by the total kWh used over the customer's billing period multiplied by 130%. This methodology shall apply until the commission issues an order suspending or modifying the operation of the floor after conducting an investigation.

2. SECURITY AND BILLING

[PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN STANDARD TERMS OF SERVICE AT THE OPTION OF POLR PROVIDER:

POLR Provider will offer the option to either pay a cash deposit to prevent disconnection after POLR provider has begun providing your electric service, pursuant to subsection (a) **TRADITIONAL CASH DEPOSIT** or to choose **PAY-IN-ADVANCE BILLING OPTION IN LIEU OF CASH DEPOSIT** pursuant to subsection (b).]

POLR Provider has no obligation to continue to serve you if you fail to pay the required cash deposit within the appropriate time frame [or to accept pay-in-advance billing.]

a) TRADITIONAL CASH DEPOSIT

If service is initiated under option (a) **TRADITIONAL CASH DEPOSIT** you will be billed monthly for your electric service after the scheduled monthly meter read date. The monthly billing period will be approximately 30 calendar days. Your bill will be due upon receipt and will be considered delinquent if it is not paid by the sixteenth (16th) day after issuance of the bill. Disconnection of service may result upon non-payment of a bill pursuant to section 4 **DISCONNECTION OF SERVICE.**

1) If your service is initiated with POLR Provider and you are required to pay a cash deposit, you will be required to pay the cash deposit after POLR Provider receives confirmation from the Registration Agent of the effective date you are to become a customer of POLR Provider. Cash deposits required for POLR service shall be equivalent to the estimated billing for a two-month period, including, where applicable, customer and non-bypassable charges, and energy and demand charges determined based on your two highest months of usage and demand in the most recent 12-month period. If 12 months of data are not available, the required two months cash deposit shall be determined by the longest available period less than 12 months.
2) If historical usage is not available, POLR Provider in its sole judgment may develop reasonable good faith estimates to determine your cash deposit amount. Estimates will be based on key energy determinants and electric equipment, including, but not limited to: square footage, HVAC size and type, type of business, hours of operation, standard industry load factor assumptions, etc. Other non-discriminatory methods of determining creditworthiness may be used.
3) You may be required, in the future, to pay an additional cash deposit or [to pay-in-advance pursuant to subsection (b)] if you have been issued a disconnection notice within the last 12 months or if you have been a customer for 12 months and you have used more than twice the amount estimated to determine your cash deposit.
4) You will accrue interest on your cash deposit with POLR Provider. Each year in December, the PUCT establishes the interest rate POLR Provider will apply to your cash deposit for the next calendar year.
5) You may satisfy security requirements by providing POLR Provider with an irrevocable letter of credit in the amount of the required cash deposit. The required security must be provided within ten calendar days after a notice is issued to you requesting a cash deposit.
6) If not previously returned to you, your cash deposit and accrued interest, less any outstanding balance owed for electric service, will be refunded to you upon closing of your account with POLR Provider.
7) If your service is terminated prior to the regularly scheduled meter read date, the final bill for service may be calculated using the out-of-cycle meter readings. Final bills will not be prorated.
8) POLR Provider will require payment of the cash deposit within ten calendar days of receiving confirmation from the Registration Agent of the effective date you become a customer of the POLR.

9) Your service may be disconnected if you fail to pay the required cash deposit within ten calendar days of issuance of a notice of disconnection of service.

b) [*PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN STANDARD TERMS OF SERVICE AT THE OPTION OF POLR PROVIDER*] **PAY-IN-ADVANCE BILLING OPTION IN LIEU OF CASH DEPOSIT**

1) If your POLR electric service is initiated by pay–in-advance, you will be billed in advance for your electric service after POLR Provider receives confirmation from the Registration Agent of the effective date you are to become a POLR customer of POLR Provider. All bills including the initial one requesting your payment in advance, will include the monthly customer charge, demand charge, energy charge, and an estimate of two months' non-bypassable charges, applicable taxes, service charges and other costs as permitted by governmental or regulatory authorities.
2) Your initial pay-in-advance billing will include charges for two months, based on historical demand (the highest demand recorded for your service in the prior 12 months) and will be due within ten calendar days of issuance of the notice requiring a pay-in-advance billing.
3) Pay-in-advance billing requires that you maintain a balance of the two-months initial total estimated charges for the time that you are a POLR customer and will be billed monthly on approximately 30-day periods.
4) Your bill will be due upon receipt and will be considered delinquent if it is not paid by the 16th calendar day after issuance of the bill.
5) If your pay-in-advance billing exceeds the initial pay-in-advance amount then the pay-in-advance billing amount will be reset to that amount for the next billing cycle.
6) There is no interest accrued on pay-in-advance billing.
7) If historical usage is not available, POLR Provider in its sole judgment may develop reasonable good faith estimates to determine your billing and establish a pay-in-advance billing amount accordingly. Estimates will be based on key energy determinants and electric equipment including, but not limited to: square footage, HVAC type and size, type of business, hours of operation, standard industry load factor assumptions, etc. Once there is an established history of six months usage, POLR Provider will review the pay-in-advance amount and adjust it if necessary. If your monthly bill exceeds the pay-in-advance amount, the pay-in-advance amount will be adjusted accordingly.
8) Billing statements will reflect the total charges for POLR services provided by POLR Provider.
9) Your service may be disconnected if you fail to pay the required pay-in-advance bill within ten calendar days of issuance of a notice of disconnection of service.

3. SERVICE CHARGES AND FEES

You will be subject to the following charges and fees in addition to the **PRICE FOR BASIC FIRM SERVICE** in section 1. These fees will be billed for each premise. "Premise" herein shall mean the designated property or facilities and associated metered account identified by an Electric Service Identifier Number (ESI ID), which is a unique and permanent identifier assigned to each Premise.

Service Charges and Fees	**Amount**
Account Reinstatement fee for handling accounts for reconnection after disconnection for non-payment. This is in addition to any applicable disconnect or reconnect charges.	$10.00
Account History charge if you request and are provided a premise usage history for more than the most recent 12 months or if a 12 month history is requested for more than once within a 12 month period.	$25.00
Collection Letter charge for processing a registered or certified letter demanding payment of past	$15.00

Service Charges and Fees	Amount
due accounts.	
Drawing on an irrevocable letter of credit. Includes all of the activities required to present a drawing letter to customer's bank.	$50.00 plus any fees imposed by financial institution
Disconnection charge for disconnection of service pursuant to TDSP's tariffs.	[Insert pass through charge from TDSP]
Equipment charge for providing testing, monitoring or other special equipment at the request of the customer.	[Insert pass through charge from TDSP]
Field Collection charge for each trip to customer's premise to collect an amount that is past due when the customer requests the trip.	$10.00/ESI ID
Field Service Calls for each trip to the customer's premise to provide non-competitive services such as billing and outage-related inquiries, as requested and approved by the customer after trip charges are disclosed. A two hour minimum will be billed for each customer requested Field Service Call and includes travel and incidental expenses with the Field Service Call as well as any TDSP discretionary charges.	$100.00/hour
Reconnection charge for reconnection of service pursuant to TDSP's tariffs.	[Insert pass through charge from TDSP]
Guardlight/Security lighting charge applies to existing guardlights or security lighting.	[Insert applicable $/kWh charge equivalent to 125% of former applicable PTB]
Master Contracts • Set-up fee per new or transferred contract • Additional fee per each unit placed on a master contract, added to an existing contract or transferred	 $25.00 $ 5.00
Master Metered Facilities: **Master Metered Tenant charge** for small non-residential 50 kW and below facilities may be assessed to recover costs associated with installing, maintaining, testing, reading or other costs incurred by POLR Provider for rendering electric service to tenants of master metered facilities. **Tenant Notification charge** for each apartment unit to recover expenses incurred each time a tenant in a master metered facility is notified of either impending disconnection for nonpayment of the electric service or of actual disconnection.	 [Insert pass through charge from TDSP] $25.00 to meet Subst. R. 25.483 minimum. $10.00 per addn'l 5 notices per 50 units over 100 units
Late fees will be assessed on the seventeenth (17th) day after the bill issuance for all unpaid balances, including pay-in-advance billing. Payment arrangements are delinquent and will be assessed late fees if not paid by the date pursuant to a negotiated payment plan. ***Late fees may not be assessed against a customer with a peak demand of less than 50 kW.***	5% assessed on the late payment amount
Out-of-cycle meter reading charge may be charged if you request an out-of-cycle meter reading:	
During regular hours	[Insert pass through charge from TDSP]

Service Charges and Fees	Amount
Outside regular working hours – Non-holiday	[Insert pass through charge from TDSP]
Outside regular working hours – Holidays	[Insert pass through charge from TDSP]
Reread request charge for each request by a customer to obtain meter readings in addition to the normal cycle readings.	[Insert pass through charge from TDSP]
Processing fee for renegotiation of a payment plan. This fee applies if you request renegotiations more than once in any 30-day period. In addition, you may be required to pay the appropriate amount to the Company to reconcile your account balance.	$10.00
Return check charge for each check returned for insufficient funds. This charge will be imposed for each returned check (or for any bill payment method that results in a notice of insufficient funds from the customer's financial institution.)	$25.00
Tampering charge for unauthorized reconnection of service, tampering with the electric meter, theft of electric service by any person on customer's premise, or evidence thereof, at Customer's premise. Additional charges for repair, replacement, relocation of equipment and estimated amount of electric service not recorded may also be billed to you.	[Insert pass through charge from TDSP]
Disconnection Reminder Notification charge for notifying customers that disconnection of service may be in progress. This notification may be made by telephone, electronically or by any means of communication appropriate for the customer.	$5.00
POLR Provider reserves the right to charge for incurred court costs, legal fees and miscellaneous costs associated with legal action as a result of maintaining customer accounts.	
POLR Provider reserves the right to charge for services, requested by you, that are rendered on your behalf after your approval of disclosed charges for those services, as well as the right to pass through tariff charges for services rendered by the TDSP and billed to POLR Provider.	

4. DISCONNECTION OF SERVICE

Disconnection means a physical interruption of electric service. Disconnection is subject to the rules of the PUCT.

a) Your account will be considered delinquent if your monthly bill or pay-in-advance bill is not paid on or before the 16th day after issuance of the bill. If your account becomes delinquent, your service may be disconnected ten calendar days after notice is issued.

b) Your service may be disconnected after you are notified of your failure to comply with the terms of this Standard Terms of Service or any payment plan.

c) Service may not be reconnected until all delinquent amounts and charges owned to POLR Provider have been paid and credit has been re-established.

d) Your service may be disconnected without notice if a dangerous or hazardous condition exists, if the service has been connected without proper authority or for the reasons prescribed in the PUCT Substantive Rules. Service will not be reconnected until the dangerous or hazardous condition has been corrected.

e) If you choose to cancel service under this Standard Terms of Service, your service will be disconnected unless you have made arrangements with another retail electric provider and a switch of provider has been successfully completed by the Registration Agent by the date you choose to cancel service. You will be responsible for any charges pursuant to section 1 **PRICE FOR BASIC FIRM SERVICE,** section 2 **SECURITY AND BILLING** and section 3 **SERVICE CHARGES AND FEES** of this agreement up to the date your service is disconnected or the date you switch electric service to another REP.

f) A disconnection notice may be issued concurrently with the written requests for either the cash deposit or with a pay-in-advance in lieu of cash deposit billing.

g) A disconnection notice may be issued concurrently with your pay-in-advance billing or cash deposit billing.

h) Your service may be disconnected for failure to pay an initial pay-in-advance bill, or monthly pay-in-advance bill, or cash deposit bill.
i) POLR Provider cannot disconnect your electric service until you are a customer of the POLR Provider.

5. CUSTOMER INFORMATION

You will be required to provide a Federal tax identification (I.D) number, a social security number, a valid driver's license number or other verifiable means of personal identification in order to allow verification of changes you request in services from POLR Provider.

You authorize the TDSP, any previous retail electric provider, or the Independent Organization to provide information to POLR Provider including, but not limited to: previous billings and usage of electricity, meter readings and types of service received, credit history, any records of tampering, and other names in which service has been provided, social security number, contact telephone number(s), tax ID or driver's license number, etc.

You authorize POLR Provider to release your customer payment information to credit reporting agencies, regulatory agents, agents of POLR Provider, energy assistance agencies, law enforcement agencies or the TDSP.

You authorize POLR Provider to use credit-reporting agencies to evaluate your credit history consistent with applicable law.

6. LENGTH OF AGREEMENT

NOTICE: POLR PROVIDER CANNOT REQUIRE THAT YOU SIGN UP FOR A MINIMUM CONTRACT TERM AS A CONDITION OF PROVIDING SERVICE.

No term of service is required under this agreement unless by mutual agreement a term is agreed to in writing between you and POLR Provider or unless you enter an agreed payment plan requiring a minimum term.

7. END OF POLR TERM

POLR Provider's Standard Terms of Service and obligations to offer the POLR rate specified under section 2, **PRICE FOR BASIC FIRM SERVICE**, will expire on [*insert last date of POLR term*]. At least 60 calendar days before that date, POLR Provider will provide you notice of available options for securing electric service after POLR's existing term has expired. If you obtain electric service from a provider other than POLR Provider, your final bill from POLR Provider will be offset against your deposit and any remaining balance will be refunded to you within seven calendar days from the final meter read date.

8. CONTACT INFORMATION

Name of Provider:	Certificate Number:
Physical Address:	Customer Assistance:
	Contact hours
	24-Hour Power Outage:
	Fax:
	Internet web-site:

You may contact POLR Provider if you have a dispute concerning your bill or your service from POLR Provider. You must provide, in writing, within ten business days of the invoice date your reasons for disputing the invoice. You will be obligated to pay the undisputed portion of the bill and the POLR may pursue disconnection of service for nonpayment of the undisputed portion after appropriate notice. In the event that you give timely notice of a dispute, you and the POLR Provider shall, for a period of 30 calendar days following the POLR Provider's receipt of the notice, pursue diligent, good faith efforts to resolve the dispute. Following resolution of the dispute, any amount

found payable by either party shall be paid within ten business days. Complaints regarding your service may also be directed to the Public Utility Commission, 1-888-782-8477 (toll free).

9. BILL PAYMENT METHODS

You may pay for your electric service by personal or cashier's check, money order, electronic funds transfer, [*Insert if offered by POLR Provider (optional):* in cash through an agent authorized by the POLR Provider], or automatic draft from your financial institution. If you choose to make payment by means of electronic funds transfer or automatic draft, you must contact POLR Provider's Customer Service number to begin those options for bill payment at no cost. Regardless of the payment method you select, all payments must be made within (16 calendar days of bill issuance. If payments are not received by POLR Provider by the end of the day on the due date, the bill will be considered delinquent and a late fee of 5% will be applied to all unpaid balances including pay-in-advance. Late fees may not be assessed against a customer with a peak demand of less than 50 kW.

If you have had two or more personal checks returned for insufficient funds within the last 12 months, POLR Provider will require all further payments for electric service to be by cash, cashier's check, or money order.

10. FORCE MAJEURE

POLR Provider shall not be liable in damages for any act or event that is beyond its control including but not limited to, an act of God, act of the public enemy, war, insurrection, riot, fire, explosion, labor disturbance or strike, terrorism, wildlife, accident, breakdown or accident to machinery or equipment, or a valid curtailment order, regulation, or restriction imposed by governmental, military, or lawfully established civilian authorities, including any directive of the independent organization, and performance or nonperformance by the TDSP.

11. LIMITATION OF LIABILITY AND INDEMNITY

POLR PROVIDER DOES NOT GENERATE YOUR ELECTRICITY, NOR DOES POLR PROVIDER TRANSMIT OR DISTRIBUTE ELECTRICITY TO YOU. POLR PROVIDER WILL NOT BE LIABLE FOR FLUCTUATIONS, INTERRUPTIONS OR IRREGULARITIES IN BASIC FIRM SERVICE. LIABILITIES NOT EXCUSED BY REASON OF FORCE MAJEURE OR OTHERWISE SHALL BE LIMITED TO DIRECT, ACTUAL DAMAGES. NEITHER YOU NOR THE POLR PROVIDER SHALL BE LIABLE TO THE OTHER FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY, OR INDIRECT DAMAGES. THESE LIMITATIONS APPLY WITHOUT REGARD TO THE CAUSE OF ANY LIABILITY OR DAMAGE.

12. REPRESENTATIONS AND WARRANTIES

POLR PROVIDER WARRANTS THAT THE ELECTRICITY SOLD UNDER THIS AGREEMENT WILL BE "BASIC FIRM SERVICE" AS THAT TERM IS DEFINED IN PUCT SUBSTANTIVE RULE 25.43(c)(1), TO WIT "ELECTRIC SERVICE NOT SUBJECT TO INTERRUPTION FOR ECONOMIC REASONS AND THAT DOES NOT INCLUDE VALUE ADDED OPTIONS OFFERED IN THE COMPETITIVE MARKET. BASIC FIRM SERVICE EXCLUDES, AMONG OTHER COMPETITIVELY OFFERED OPTIONS, EMERGENCY OR BACK-UP SERVICE, AND STAND-BY SERVICE."

POLR PROVIDER MAKES NO OTHER WARRANTIES WHATSOEVER WITH REGARD TO THE PROVISION OF ELECTRIC SERVICE AND DISCLAIMS ANY AND ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

13. DISCRIMINATION

POLR Provider will not refuse to provide electric service or otherwise discriminate in the provision of electric service to any customer based on race, creed, color, national origin, ancestry, sex, marital status, lawful source of

income, disability, familial status, level of income, location of customer in an economically distressed geographic area, or qualification for low-income or energy efficiency services.

You have the right to cancel this agreement (Standard Terms of Service) for electric service without penalty or fee of any kind for a period of three federal business days after you have received the Standard Terms of Service. You may cancel your service and this agreement by calling the toll free Customer Service number during the hours stated in this Standard Terms of Service. Service may also be cancelled by toll-free fax or e-mail. ***Canceling this service agreement will result in disconnection of service if you have not made arrangements for alternative supply.***

Figure: 16 TAC §25.43(f)(1)(C)

Standard Terms of Service

[Insert POLR Provider Name] (Certificate No._____)
Provider of Last Resort (POLR) Medium Non-Residential Service

This Standard Terms of Service (STOS) applies to medium non-residential customers (i.e., 50 kW or greater, but less than 1,000 kW (one Megawatt)) receiving Provider of Last Resort (POLR) service from POLR Provider under Public Utility Commission of Texas (PUCT) Retail Electric Provider (REP) Certificate No. ___. These Standard Terms of Service are subject to current and future customer protection laws or rules as prescribed by local, state or federal authorities and to changes in applicable charges or transmission and distribution service provider (TDSP) rates. Customers will be notified of material changes in these Standard Terms of Service resulting from changes in local, state, or federal legislation or rules, applicable charges, or TDSP rates, at least 45 calendar days before such changes take effect, unless otherwise directed by law. Each Standard Terms of Service will be given a unique version number for quick reference.

SPANISH LANGUAGE (IDIOMA ESPANOL) Si usted quiere obtener el mismo documento impreso detallando los Términos de Servicio en español comunicandose con nosotros al [*insert toll-free number*].

1. PRICE FOR BASIC FIRM SERVICE.

POLR Provider will provide basic firm service, defined as electric service not subject to interruption for economic reasons and that does not include value-added options offered in the competitive market. The rate for your electric service from POLR Provider will be based on the formula detailed below. These charges may be applied in a pay-in-advance manner as described in section 2 **SECURITY AND BILLING.**] Non-recurring charges will be billed as they are incurred and are set out in section 3 **SERVICE CHARGES AND FEES** below.

Your rate for POLR service will be derived from the following formula:

POLR rate (in $ per kWh) = (Non-bypassable charges + POLR customer charge + POLR demand charge + POLR energy charge) / kWh used

Where:

(i) Non-bypassable charges shall be all TDU and other non-bypassable charges and credits for the appropriate customer class in the applicable service territory, including ERCOT administrative charges, nodal fees or surcharges, replacement reserve charges attributable to POLR load, and applicable taxes from various taxing or regulatory authorities, multiplied by the level of kWh and KW used, where appropriate.

(ii) POLR customer charge shall be $0.025 per kWh.

(iii) POLR demand charge shall be $2.00 per kW, per month, for customers that have a demand meter, and $50.00 per month for customers that do not have a demand meter.

(iv) POLR energy charge shall be the sum over the billing period of the actual hourly MCPEs, for the customer multiplied by the level of kWh used, multiplied by 130%, multiplied by the level of kWh used.

(v) "Actual hourly MCPE" is an hourly rate based on a simple average of the actual interval MCPE prices over the hour.

(vi) "Level of kWh used" is based either on interval data or on an allocation of the customer's total actual usage to the hour based on a ratio of the sum of the ERCOT backcasted profile interval usage data over the hour to the total of the ERCOT backcasted profile interval usage data over the customer's entire billing period.

(vii) For each billing period, if the sum over the billing period of the actual hourly MCPEs for a customer multiplied by the level of kWh used falls below the simple average of the zonal MCPE prices over the 12-month period ending September 1 of the preceding year

multiplied by the total kWh used over the customer's billing period, then the POLR energy charge shall be the simple average of the zonal MCPE prices over the 12-month period ending September 1 of the preceding year multiplied by the total kWh used over the customer's billing period multiplied by 130%. This methodology shall apply until the commission issues an order suspending or modifying the operation of the floor after conducting an investigation.

2. SECURITY AND BILLING

[PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN STANDARD TERMS OF SERVICE AT THE OPTION OF POLR PROVIDER:

POLR Provider will offer the option to either pay a cash deposit to prevent disconnection after POLR provider has begun providing your electric service, pursuant to subsection (a) **TRADITIONAL CASH DEPOSIT** or to choose **PAY-IN-ADVANCE BILLING OPTION IN LIEU OF CASH DEPOSIT** pursuant to subsection (b).]

POLR Provider has no obligation to continue to serve you if you fail to pay the required cash deposit within the appropriate time frame [or to accept pay-in-advance billing.]

a) TRADITIONAL CASH DEPOSIT

If service is initiated under option (a) **TRADITIONAL CASH DEPOSIT** you will be billed monthly for your electric service after the scheduled monthly meter read date. The monthly billing period will be approximately 30 calendar days. Your bill will be due upon receipt and will be considered delinquent if it is not paid by the sixteenth (16th) day after issuance of the bill. Disconnection of service may result upon non-payment of a bill pursuant to section 4 **DISCONNECTION OF SERVICE.**

1) If your service is initiated with POLR Provider and you are required to pay a cash deposit, you will be required to pay the cash deposit after POLR Provider receives confirmation from the Registration Agent of the effective date you are to become a customer of POLR Provider. Cash deposits required for POLR service shall be equivalent to the estimated billing for a two-month period, including, where applicable, customer and non-bypassable charges, and energy and demand charges determined based on your two highest months of usage and demand in the most recent 12-month period. If 12 months of data are not available, the required two months cash deposit shall be determined by the longest available period less than 12 months.
2) If historical usage is not available, POLR Provider in its sole judgment may develop reasonable good faith estimates to determine your cash deposit amount. Estimates will be based on key energy determinants and electric equipment, including, but not limited to: square footage, HVAC size and type, type of business, hours of operation, standard industry load factor assumptions, etc. Other non-discriminatory methods of determining creditworthiness may be used.
3) You may be required, in the future, to pay an additional cash deposit or [to pay-in-advance pursuant to subsection (b)] if you have been issued a disconnection notice within the last 12 months or if you have been a customer for 12 months and you have used more than twice the amount estimated to determine your cash deposit.
4) You will accrue interest on your cash deposit with POLR Provider. Each year in December, the PUCT establishes the interest rate POLR Provider will apply to your cash deposit for the next calendar year.
5) You may satisfy security requirements by providing POLR Provider with an irrevocable letter of credit in the amount of the required cash deposit. The required security must be provided within ten calendar days after a notice is issued to you requesting a cash deposit.
6) If not previously returned to you, your cash deposit and accrued interest, less any outstanding balance owed for electric service, will be refunded to you upon closing of your account with POLR Provider.
7) If your service is terminated prior to the regularly scheduled meter read date, the final bill for service may be calculated using the out-of-cycle meter readings. Final bills will not be prorated.

8) POLR Provider will require payment of the cash deposit within ten calendar days of receiving confirmation from the Registration Agent of the effective date you become a customer of the POLR.
9) Your service may be disconnected if you fail to pay the required cash deposit within ten calendar days of issuance of a notice of disconnection of service.

b) [*PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN STANDARD TERMS OF SERVICE AT THE OPTION OF POLR PROVIDER*] **PAY-IN-ADVANCE BILLING OPTION IN LIEU OF CASH DEPOSIT**

1) If your POLR electric service is initiated by pay–in-advance, you will be billed in advance for your electric service after POLR Provider receives confirmation from the Registration Agent of the effective date you are to become a POLR customer of POLR Provider. All bills including the initial one requesting your payment in advance, will include the monthly customer charge, demand charge, energy charge, and an estimate of two months' non-bypassable charges, applicable taxes, service charges and other costs as permitted by governmental or regulatory authorities.
2) Your initial pay-in-advance billing will include charges for two months, based on historical demand (the highest demand recorded for your service in the prior 12 months) and will be due within ten calendar days of issuance of the notice requiring a pay-in-advance billing.
3) Pay-in-advance billing requires that you maintain a balance of the two-months initial total estimated charges for the time that you are a POLR customer and will be billed monthly on approximately 30-day periods.
4) Your bill will be due upon receipt and will be considered delinquent if it is not paid by the 16th calendar day after issuance of the bill.
5) If your pay-in-advance billing exceeds the initial pay-in-advance amount then the pay-in-advance billing amount will be reset to that amount for the next billing cycle.
6) There is no interest accrued on pay-in-advance billing.
7) If historical usage is not available, POLR Provider in its sole judgment may develop reasonable good faith estimates to determine your billing and establish a pay-in-advance billing amount accordingly. Estimates will be based on key energy determinants and electric equipment including, but not limited to: square footage, HVAC type and size, type of business, hours of operation, standard industry load factor assumptions, etc. Once there is an established history of six months usage, POLR Provider will review the pay-in-advance amount and adjust it if necessary. If your monthly bill exceeds the pay-in-advance amount, the pay-in-advance amount will be adjusted accordingly.
8) Billing statements will reflect the total charges for POLR services provided by POLR Provider.
9) Your service may be disconnected if you fail to pay the required pay-in-advance bill within ten calendar days of issuance of a notice of disconnection of service.

3. SERVICE CHARGES AND FEES

You will be subject to the following charges and fees in addition to the **PRICE FOR BASIC FIRM SERVICE** in section 1. These fees will be billed for each premise. "Premise" herein shall mean the designated property or facilities and associated metered account identified by an Electric Service Identifier Number (ESI ID), which is a unique and permanent identifier assigned to each Premise.

Service Charges and Fees	**Amount**
Account Reinstatement fee for handling accounts for reconnection after disconnection for non-payment. This is in addition to any applicable disconnect or reconnect charges.	$10.00
Account History charge if you request and are provided a premise usage history for more than the most recent 12 months or if a 12 month history is requested for more than once within a 12 month period.	$25.00

Service Charges and Fees	Amount
Collection Letter charge for processing a registered or certified letter demanding payment of past due accounts.	$15.00
Drawing on an irrevocable letter of credit. Includes all of the activities required to present a drawing letter to customer's bank.	$50.00 plus any fees imposed by financial institution
Disconnection charge for disconnection of service pursuant to TDSP's tariffs.	[Insert pass through charge from TDSP]
Equipment charge for providing testing, monitoring or other special equipment at the request of the customer.	[Insert pass through charge from TDSP]
Field Collection charge for each trip to customer's premise to collect an amount that is past due when the customer requests the trip.	$10.00/ESI ID
Field Service Calls for each trip to the customer's premise to provide non-competitive services such as billing and outage-related inquiries, as requested and approved by the customer after trip charges are disclosed. A two hour minimum will be billed for each customer requested Field Service Call and includes travel and incidental expenses with the Field Service Call as well as any TDSP discretionary charges.	$100.00/hour
Reconnection charge for reconnection of service pursuant to TDSP's tariffs.	[Insert pass through charge from TDSP]
Guardlight/Security lighting charge applies to existing guardlights or security lighting.	[Insert applicable $/kWh charge equivalent to 125% of former applicable PTB]
Master Contracts • Set-up fee per new or transferred contract • Additional fee per each unit placed on a master contract, added to an existing contract or transferred	 $25.00 $ 5.00
Master Metered Facilities: **Master Metered Tenant charge** for small non-residential 50 kW and below facilities may be assessed to recover costs associated with installing, maintaining, testing, reading or other costs incurred by POLR Provider for rendering electric service to tenants of master metered facilities. **Tenant Notification charge** for each apartment unit to recover expenses incurred each time a tenant in a master metered facility is notified of either impending disconnection for nonpayment of the electric service or of actual disconnection.	 [Insert pass through charge from TDSP] $25.00 to meet Subst. R. 25.483 minimum. $10.00 per addn'l 5 notices per 50 units over 100 units
Late fees will be assessed on the seventeenth (17^{th}) day after the bill issuance for all unpaid balances, including pay-in-advance billing. Payment arrangements are delinquent and will be assessed late fees if not paid by the date pursuant to a negotiated payment plan.	5% assessed on the late payment amount
Out-of-cycle meter reading charge may be charged if you request an out-of-cycle meter reading:	
During regular hours	[Insert pass through charge from TDSP]

Service Charges and Fees	Amount
Outside regular working hours – Non-holiday	[Insert pass through charge from TDSP]
Outside regular working hours – Holidays	[Insert pass through charge from TDSP]
Reread request charge for each request by a customer to obtain meter readings in addition to the normal cycle readings.	[Insert pass through charge from TDSP]
Processing fee for renegotiation of a payment plan. This fee applies if you request renegotiations more than once in any 30-day period. In addition, you may be required to pay the appropriate amount to the Company to reconcile your account balance.	$10.00
Return check charge for each check returned for insufficient funds. This charge will be imposed for each returned check (or for any bill payment method that results in a notice of insufficient funds from the customer's financial institution.)	$25.00
Tampering charge for unauthorized reconnection of service, tampering with the electric meter, theft of electric service by any person on customer's premise, or evidence thereof, at Customer's premise. Additional charges for repair, replacement, relocation of equipment and estimated amount of electric service not recorded may also be billed to you.	[Insert pass through charge from TDSP]
Disconnection Reminder Notification charge for notifying customers that disconnection of service may be in progress. This notification may be made by telephone, electronically or by any means of communication appropriate for the customer.	$5.00
POLR Provider reserves the right to charge for incurred court costs, legal fees and miscellaneous costs associated with legal action as a result of maintaining customer accounts.	
POLR Provider reserves the right to charge for services, requested by you, that are rendered on your behalf after your approval of disclosed charges for those services, as well as the right to pass through tariff charges for services rendered by the TDSP and billed to POLR Provider.	

4. DISCONNECTION OF SERVICE

Disconnection means a physical interruption of electric service. Disconnection is subject to the rules of the PUCT.

a) Your account will be considered delinquent if your monthly bill or pay-in-advance bill is not paid on or before the 16th day after issuance of the bill. If your account becomes delinquent, your service may be disconnected ten calendar days after notice is issued.

b) Your service may be disconnected after you are notified of your failure to comply with the terms of this Standard Terms of Service or any payment plan.

c) Service may not be reconnected until all delinquent amounts and charges owned to POLR Provider have been paid and credit has been re-established.

d) Your service may be disconnected without notice if a dangerous or hazardous condition exists, if the service has been connected without proper authority or for the reasons prescribed in the PUCT Substantive Rules. Service will not be reconnected until the dangerous or hazardous condition has been corrected.

e) If you choose to cancel service under this Standard Terms of Service, your service will be disconnected unless you have made arrangements with another retail electric provider and a switch of provider has been successfully completed by the Registration Agent by the date you choose to cancel service. You will be responsible for any charges pursuant to section 1 **PRICE FOR BASIC FIRM SERVICE,** section 2 **SECURITY AND BILLING** and section 3 **SERVICE CHARGES AND FEES** of this agreement up to the date your service is disconnected or the date you switch electric service to another REP.

f) A disconnection notice may be issued concurrently with the written requests for either the cash deposit or with a pay-in-advance in lieu of cash deposit billing.

g) A disconnection notice may be issued concurrently with your pay-in-advance billing or cash deposit billing.

h) Your service may be disconnected for failure to pay an initial pay-in-advance bill, or monthly pay-in-advance bill, or cash deposit bill.
i) POLR Provider cannot disconnect your electric service until you are a customer of the POLR Provider.

5. CUSTOMER INFORMATION

You will be required to provide a Federal tax identification (I.D) number, a social security number, a valid driver's license number or other verifiable means of personal identification in order to allow verification of changes you request in services from POLR Provider.

You authorize the TDSP, any previous retail electric provider, or the Independent Organization to provide information to POLR Provider including, but not limited to: previous billings and usage of electricity, meter readings and types of service received, credit history, any records of tampering, and other names in which service has been provided, social security number, contact telephone number(s), tax ID or driver's license number, etc.

You authorize POLR Provider to release your customer payment information to credit reporting agencies, regulatory agents, agents of POLR Provider, energy assistance agencies, law enforcement agencies or the TDSP.

You authorize POLR Provider to use credit-reporting agencies to evaluate your credit history consistent with applicable law.

6. LENGTH OF AGREEMENT

NOTICE: POLR PROVIDER CANNOT REQUIRE THAT YOU SIGN UP FOR A MINIMUM CONTRACT TERM AS A CONDITION OF PROVIDING SERVICE.

No term of service is required under this agreement unless by mutual agreement a term is agreed to in writing between you and POLR Provider or unless you enter an agreed payment plan requiring a minimum term.

7. WAIVER OF CERTAIN CUSTOMER PROTECTION RULES

For the medium non-residential customer class, the Customer Protection Rule provisions contained within Subchapter R of this chapter shall be deemed waived by the execution of this Standard Terms of Service, except for the following:

a) §25.481, relating to Unauthorized Charges;
b) §25.485(a)-(b), relating to Customer Access and Complaint Handling; and
c) §25.495, relating to Unauthorized Change of Retail Electric Provider.

8. END OF POLR TERM

POLR Provider's Standard Terms of Service and obligations to offer the POLR rate specified under section 2, **PRICE FOR BASIC FIRM SERVICE**, will expire on [*insert last date of POLR term*]. At least 60 calendar days before that date, POLR Provider will provide you notice of available options for securing electric service after POLR's existing term has expired. If you obtain electric service from a provider other than POLR Provider, your final bill from POLR Provider will be offset against your deposit and any remaining balance will be refunded to you within seven calendar days from the final meter read date.

9. CONTACT INFORMATION

Name of Provider:
Physical Address:

Certificate Number:
Customer Assistance:
Contact hours
24-Hour Power Outage:
Fax:
Internet web-site:

You may contact POLR Provider if you have a dispute concerning your bill or your service from POLR Provider. You must provide, in writing, within ten business days of the invoice date your reasons for disputing the invoice. You will be obligated to pay the undisputed portion of the bill and the POLR may pursue disconnection of service for nonpayment of the undisputed portion after appropriate notice. In the event that you give timely notice of a dispute, you and the POLR Provider shall, for a period of 30 calendar days following the POLR Provider's receipt of the notice, pursue diligent, good faith efforts to resolve the dispute. Following resolution of the dispute, any amount found payable by either party shall be paid within ten business days. Complaints regarding your service may also be directed to the Public Utility Commission, 1-888-782-8477 (toll free).

10. BILL PAYMENT METHODS

You may pay for your electric service by personal or cashier's check, money order, electronic funds transfer, [*Insert if offered by POLR Provider (optional):* in cash through an agent authorized by the POLR Provider], or automatic draft from your financial institution. If you choose to make payment by means of electronic funds transfer or automatic draft, you must contact POLR Provider's Customer Service number to begin those options for bill payment at no cost. Regardless of the payment method you select, all payments must be made within (16 calendar days of bill issuance. If payments are not received by POLR Provider by the end of the day on the due date, the bill will be considered delinquent and a late fee of 5% will be applied to all unpaid balances including pay-in-advance. Late fees may not be assessed against a customer with a peak demand of less than 50 kW.

If you have had two or more personal checks returned for insufficient funds within the last 12 months, POLR Provider will require all further payments for electric service to be by cash, cashier's check, or money order.

11. FORCE MAJEURE

POLR Provider shall not be liable in damages for any act or event that is beyond its control including but not limited to, an act of God, act of the public enemy, war, insurrection, riot, fire, explosion, labor disturbance or strike, terrorism, wildlife, accident, breakdown or accident to machinery or equipment, or a valid curtailment order, regulation, or restriction imposed by governmental, military, or lawfully established civilian authorities, including any directive of the independent organization, and performance or nonperformance by the TDSP.

12. LIMITATION OF LIABILITY AND INDEMNITY

POLR PROVIDER DOES NOT GENERATE YOUR ELECTRICITY, NOR DOES POLR PROVIDER TRANSMIT OR DISTRIBUTE ELECTRICITY TO YOU. POLR PROVIDER WILL NOT BE LIABLE FOR FLUCTUATIONS, INTERRUPTIONS OR IRREGULARITIES IN BASIC FIRM SERVICE. LIABILITIES NOT EXCUSED BY REASON OF FORCE MAJEURE OR OTHERWISE SHALL BE LIMITED TO DIRECT, ACTUAL DAMAGES. NEITHER YOU NOR THE POLR PROVIDER SHALL BE LIABLE TO THE OTHER FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY, OR INDIRECT DAMAGES. THESE LIMITATIONS APPLY WITHOUT REGARD TO THE CAUSE OF ANY LIABILITY OR DAMAGE.

13. REPRESENTATIONS AND WARRANTIES

POLR PROVIDER WARRANTS THAT THE ELECTRICITY SOLD UNDER THIS AGREEMENT WILL BE "BASIC FIRM SERVICE" AS THAT TERM IS DEFINED IN PUCT SUBSTANTIVE RULE 25.43(c)(1), TO WIT "ELECTRIC SERVICE NOT SUBJECT TO INTERRUPTION FOR ECONOMIC REASONS AND THAT DOES NOT INCLUDE VALUE ADDED OPTIONS OFFERED IN THE COMPETITIVE MARKET. BASIC FIRM SERVICE EXCLUDES, AMONG OTHER COMPETITIVELY OFFERED OPTIONS, EMERGENCY OR BACK-UP SERVICE, AND STAND-BY SERVICE."

POLR PROVIDER MAKES NO OTHER WARRANTIES WHATSOEVER WITH REGARD TO THE PROVISION OF ELECTRIC SERVICE AND DISCLAIMS ANY AND ALL OTHER WARRANTIES, EXPRESS

OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

14. DISCRIMINATION

POLR Provider will not refuse to provide electric service or otherwise discriminate in the provision of electric service to any customer based on race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, disability, familial status, level of income, location of customer in an economically distressed geographic area, or qualification for low-income or energy efficiency services.

You have the right to cancel this agreement (Standard Terms of Service) for electric service without penalty or fee of any kind for a period of three federal business days after you have received the Standard Terms of Service. You may cancel your service and this agreement by calling the toll free Customer Service number during the hours stated in this Standard Terms of Service. Service may also be cancelled by toll-free fax or e-mail. ***Canceling this service agreement will result in disconnection of service if you have not made arrangements for alternative supply.***

Figure: 16 TAC §25.43(f)(1)(D)

Standard Terms of Service

[Insert POLR Provider Name] (Certificate No.____)
Provider of Last Resort (POLR) Large Non-Residential Service (> = One Megawatt)

This Standard Terms of Service applies to Large Non-Residential customers receiving Provider of Last Resort (POLR) service from pursuant to Public Utility Commission of Texas (PUCT) Retail Electric Provider (REP) Certificate No. ___. These Standard Terms of Service are subject to certain current and future customer protection laws or rules as prescribed by local, state or federal authorities and to changes in applicable charges or transmission and distribution service provider (TDSP) rates. Customers will be notified of changes in applicable charges or TDSP rates, except for changes in the price for basic firm service as described below, at least 45 calendar days before such changes take effect, unless otherwise directed by law. Each Standard Terms of Service will be given a unique version number for quick reference.

1. PRICE FOR BASIC FIRM SERVICE.

POLR Provider will provide basic firm service, defined as electric service not subject to interruption for economic reasons and that does not include value-added options offered in the competitive market.

The price for your electric service from POLR Provider will be derived from the following formula:

POLR rate (in $ per kWh) = (Non-bypassable charges + POLR customer charge + POLR demand charge + POLR energy charge) / kWh used

Where:

(i) Non-bypassable charges shall be all TDU and other non-bypassable charges and credits for the appropriate customer class in the applicable service territory, including ERCOT administrative charges, nodal fees or surcharges, replacement reserve charges attributable to POLR load, and applicable taxes from various taxing or regulatory authorities, multiplied by the level of kWh and kW used, where appropriate.

(ii) POLR customer charge shall be $2,897.00 per month.

(iii) POLR demand charge shall be $6.00 per kW, per month.

(iv) POLR energy charge shall be the appropriate MCPE, determined on the basis of 15-minute intervals, for the customer multiplied by 130%, multiplied by the level of kWh used. The MCPE shall have a floor of $7.25 per MWH.

Non-recurring charges will be billed as they are incurred and are set out in section 3 **SERVICE CHARGES AND FEES** below.

2. SECURITY AND BILLING

[PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN STANDARD TERMS OF SERVICE AT THE OPTION OF POLR PROVIDER:

POLR Provider will offer the option to either pay a cash deposit to prevent disconnection after POLR provider has begun providing your electric service, pursuant to subsection (a) **TRADITIONAL CASH DEPOSIT** or to choose **PAY-IN-ADVANCE BILLING OPTION IN LIEU OF CASH DEPOSIT** pursuant to subsection (b). You will either be required to pay a cash deposit or be subject to pay-in-advance billing.]

POLR Provider has no obligation to continue to serve you if you fail to pay the required cash deposit within the appropriate time frame [or to accept pay-in-advance billing.]

a) TRADITIONAL CASH DEPOSIT

If service is initiated under option (a) **TRADITIONAL CASH DEPOSIT** you will be billed monthly for your electric service after the scheduled monthly meter read date. The monthly billing period will be approximately 30 calendar days. Your bill will be due upon receipt and will be considered delinquent if it is not paid by the sixteenth (16^{th}) day after issuance of the bill. The late payment fee (5%) will be assessed on the seventeenth (17^{th}) day after the bill issuance for all unpaid balances. Disconnection of service may result upon non-payment of a bill pursuant to section 4 **DISCONNECTION OF SERVICE.**

1) If your service is initiated with POLR Provider, you will be required to pay a cash deposit or letter of credit after POLR Provider receives confirmation from the Registration Agent of the effective date you are to become a customer of POLR Provider. Cash deposits required for POLR service shall be equivalent to the estimated billing for a three-month period, including, where applicable, customer and non-bypassable charges, and energy and demand charges determined based on your three highest months of usage and demand during the most recent 12-month period.
2) If historical usage is not available, POLR Provider in its sole judgment may develop reasonable good faith estimates to determine your cash deposit amount. Estimates will be based on key energy determinants and electric equipment, including, but not limited to: square footage, HVAC type and size, type of business, hours of operation, standard industry load factor assumptions, etc. Other non-discriminatory methods of determining creditworthiness may be used.
3) You may also be required, in the future, to pay an additional cash deposit if you have been issued a disconnection notice or if you have been a customer for three months and you have used more than the amount estimated to determine your initial cash deposit.
4) You will accrue interest on your deposit with POLR Provider. Each year in December, the PUCT establishes the interest rate the POLR Provider will apply to your cash deposit for the next calendar year.
5) You may satisfy security requirements by providing POLR Provider with a surety bond or an irrevocable letter of credit in the amount of the required cash deposit. The surety bond must be approved by the POLR provider. The required security must be provided within three calendar days after a notice is issued to you requesting a cash deposit.
6) If not previously returned to you, your cash deposit and accrued interest, less any outstanding balance owed for electric service, will be refunded to you upon closing of your account with POLR Provider.
7) If your service is terminated prior to the regularly scheduled meter read date, the energy usage for the final bills may be calculated using the out-of-cycle meter readings and will include all charges defined in section 1. **Price for Basic Firm Service**.
8) POLR Provider will require payment of the cash deposit within three calendar days of receiving confirmation from the Registration Agent of the effective date you become a customer of the POLR.
9) Your service may be disconnected if you fail to pay the required cash deposit within three calendar days of issuance of a notice of disconnection of service.

b) *[PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN STANDARD TERMS OF SERVICE AT THE OPTION OF POLR PROVIDER]* PAY-IN-ADVANCE BILLING OPTION IN LIEU OF CASH DEPOSIT

1) If your POLR electric service is initiated by pay-in-advance, you will be billed in advance for your electric service after POLR Provider receives confirmation from the Registration Agent of the effective date you are to become a POLR customer of POLR Provider. All bills will include the monthly customer charge, demand charge, energy charge, and an estimate of two months' non-bypassable

charges, applicable fees, taxes, service charges and other costs as permitted by governmental or regulatory authorities.

2) Your initial pay-in-advance billing will include, where applicable, charges for two months, based on historical demand and will be due within three calendar days of issuance of the notice requiring a pay-in-advance billing
3) Pay-in-advance billing requires that you maintain a balance of the two-month initial total estimated charges for the time that you are a POLR customer and will be billed monthly on approximately 30-day periods.
4) Your bill will be due upon receipt and will be considered delinquent if it is not paid by the 16th calendar day after issuance of the bill.
5) If your pay-in-advance billing exceeds the initial pay-in-advance amount, then the pay-in-advance billing amount will be reset to that amount for the next billing cycle.
6) There is no interest accrued on pay-in-advance billing.
7) If historical usage is not available, POLR Provider in its sole judgment may develop reasonable good faith estimates to determine your billing and establish a pay-in-advance billing amount accordingly. Estimates will be based on key energy determinants and electric equipment including, but not limited to: square footage, HVAC type and size, type of business, hours of operation, standard industry load factor assumptions, etc. Once there is an established history of three months usage, POLR Provider will review the pay-in-advance amount and adjust it if necessary. If at any time the sum of your two highest monthly bills exceeds the pay-in-advance amount, the pay-in-advance amount may be adjusted accordingly.
8) Billing statements will reflect the total charges for POLR services provided by POLR Provider.
9) Your service may be disconnected if you fail to pay the required pay-in-advance bill within three calendar days of issuance of a notice of disconnection of service.

3. SERVICE CHARGES AND FEES

You will be subject to the following charges and fees in addition to the rates for service prescribed in section 1 **PRICE FOR BASIC FIRM SERVICE.** These fees will be billed for each premise. "Premise" herein shall mean the designated property or facilities and associated metered account identified by an Electric Service Identifier Number (ESI ID), which is a unique and permanent identifier assigned to each service point.

Service Charges and Fees	Amount
Account Reinstatement fee for handling accounts for reconnection after disconnection for non-payment. This is in addition to any applicable disconnect or reconnect charges.	$ 50.00
Account History charge if you request and are provided a service point usage history for more than the most recent 12 months or if a 12-month history is requested more than once within a 12-month period.	$ 25.00
Collection Letter charge for processing a registered or certified letter demanding payment of past due accounts or drawing on your letter of credit.	$15.00
Drawing on irrevocable letter of credit includes all of the activities required to present a drawing letter to your bank.	$150.00 plus any fees imposed by financial institution
Disconnection charge for disconnection of service pursuant to TDSP's tariffs, including charges that may be assessed by the TDSP for scheduling a disconnection that is canceled.	[Insert pass through charge from TDSP]
Equipment charge for providing testing, monitoring or other special equipment at the request of the customer.	[Insert pass through charge from TDSP]
Field Collection charge for each trip to a customer's premise to collect an amount that is past due when the customer requests the trip.	$10.00 / ESI ID
Field Service Calls for each trip to the customer's premise to provide non-competitive services such as	

Service Charges and Fees	Amount
billing and outage-related inquiries, as requested and approved by the customer after trip charges are disclosed. A four hour minimum will be billed for each customer requested Field Service Call and includes travel and incidental expenses with the field service call.	$200.00/hour
Late fees will be assessed on the seventeenth (17th) day after the bill issuance for all unpaid balances, including pay-in-advance billing. Payment arrangements are delinquent and will be assessed a late fee if not paid by the date pursuant to a negotiated payment plan.	5% assessed on the late payment amounts
Master Contracts ▪ Set-up fee per new or transferred contract ▪ Additional fee per each unit placed on a master contract, added to an existing contract or transferred	$25.00 $ 5.00
Master Metered Facilities: **Master Metered Tenant charge** for facilities may be assessed to recover costs associated with installing, maintaining, testing, reading or other costs incurred by POLR Provider for rendering electric service to tenants of master metered facilities. **Tenant Notification charge** for each apartment unit to recover expenses incurred each time a tenant in a master meter facility is notified of either impending disconnection for nonpayment of the electric service or of actual disconnection.	[Insert pass through charge from TDSP] $25.00 to meet Subst. R. 25.483 minimum. $10.00 per addn'l 5 notices per 50 units over 100 units
Out-of-cycle meter reading charge may be charged if you request an out-of-cycle meter reading.	
During regular hours	[Insert pass through charge from TDSP]
Outside regular working hours – Non-holiday	[Insert pass through charge from TDSP]
Outside regular working hours – Holidays	[Insert pass through charge from TDSP]
Reread request charge for each request by a customer to obtain meter readings in addition to the normal cycle readings.	[Insert pass through charge from TDSP]
Return check charge for each check returned for insufficient funds. This charge will be imposed for each returned check (or for any bill payment method that results in a notice of insufficient funds from the customer's financial institution.)	$ 25.00
Unmetered Guardlight/Security lighting charge applies to existing guardlights or security lighting.	[Insert applicable $/kWh charge equivalent to 125% of former applicable PTB tariff for unmetered guardlight/securit

Service Charges and Fees	Amount
	y lighting]
Tampering charge for unauthorized reconnection of service, tampering with the electric meter, theft of electric service by any person on customer's premise, or evidence thereof, at customer's premise. Additional charges for repair, replacement, relocation of equipment and estimated amount of electric service not recorded may also be billed.	[Insert pass through charge from TDSP]
Disconnection Reminder Notification charge for notifying customers that disconnection of service may be in progress. This notification may be made by telephone, electronically or by any other means of communication appropriate for the customer.	$5.00
POLR Provider reserves the right to charge for court costs, legal fees and other costs associated with collection of delinquent amounts and miscellaneous legal costs associated with maintaining the account.	
POLR Provider reserves the right to charge for services, requested by you, that are rendered on your behalf after your approval of disclosed charges for those services, as well as the right to pass through tariff charges for services rendered by the TDSP and billed to POLR Provider.	

4. DISCONNECTION OF SERVICE

Disconnection means a physical interruption of electric service. Disconnection is subject to the rules of the PUCT.

a) Your account will be considered delinquent if payment for your monthly bill or pay-in-advance billing is not paid on or before the 16th day after issuance of the bill. If your account becomes delinquent, your service may be disconnected three calendar days after notice is issued.

b) Your service may be disconnected for failure to pay cash deposit as well as pay in advance. Your service may be disconnected after you are notified of your failure to comply with the terms of this Standard Terms of Service or any payment plan.

c) Service may not be reconnected until all delinquent amounts and charges owed to POLR Provider have been paid and credit has been re-established. Upon receipt of all amounts and charges owed service may not be reconnected immediately and is dependent upon TDSP scheduling.

d) Your service may be disconnected without notice if a dangerous or hazardous condition exists, if the service has been connected without proper authority or for the reasons prescribed in the PUCT Substantive Rules. Service will not be reconnected until the dangerous or hazardous condition has been corrected.

e) If you choose to cancel service under this Standard Terms of Service, your service will be disconnected unless you have made arrangements with another retail electric provider and a switch to the new provider has been successfully completed by the Registration Agent by the date you choose to cancel service. You will be responsible for any charges pursuant to section 1 **PRICE FOR BASIC SERVICE,** section 2 **SECURITY AND BILLING** and section 3 **SERVICE CHARGES AND FEES** of this agreement up to the date your service is disconnected or the date you switch electric service to another REP.

f) A disconnection notice may be issued concurrently with the written requests for either the cash deposit or with a pay-in-advance in lieu of cash deposit billing.

g) A disconnection notice may be issued concurrently with your pay-in-advance or cash deposit billing.

h) Your service may be disconnected for failure to pay an initial pay-in-advance bill or monthly pay-in-advance bill.

i) POLR Provider cannot disconnect your electric service until you are a customer of the POLR Provider.

5. CUSTOMER INFORMATION

You will be required to provide a legal name, Federal tax identification (I.D.) number, a social security number, a valid driver's license number or other verifiable means of identification in order to allow verification of changes you request in services from POLR Provider.

You authorize the TDSP, any previous retail electric provider, or the Independent Organization to provide information to POLR Provider including but not limited to previous billings and usage of electricity, meter readings and types of service received, credit history, any records of tampering, other names in which service has been provided, social security number, contact telephone number(s), tax ID or driver's license number, etc.

You authorize POLR Provider at POLR Providers discretion to release your customer payment information to credit reporting agencies, regulatory agents, agents of POLR Provider, energy assistance agencies, law enforcement agencies or the TDSP.

You authorize POLR Provider to use credit-reporting agencies to evaluate your credit history consistent with applicable law.

6. LENGTH OF AGREEMENT

NOTICE: POLR PROVIDER CANNOT REQUIRE THAT YOU SIGN UP FOR A MINIMUM CONTRACT TERM AS A CONDITION OF PROVIDING SERVICE.

Subject to the advance payment provisions described in section 2, no term of service is required under this Standard Terms of Service unless by mutual agreement a term is agreed to in writing between you and POLR Provider or if you enter an agreed payment plan requiring a minimum term.

7. END OF POLR TERM

POLR Provider's Standard Terms of Service and obligations to offer the POLR rate specified under section 1, **PRICE FOR BASIC FIRM SERVICE**, will expire on [*insert last date of POLR term*]. At least 60 calendar days before that date, POLR Provider will provide you notice of available options for securing electric service after POLR's existing term has expired. If you obtain electric service from a provider other than POLR Provider, your final bill from POLR Provider will be offset against your deposit and any remaining balance will be refunded to you within seven calendar days from the final meter read date.

8. CONTACT INFORMATION

Name of Provider:	Certificate Number:
Physical Address:	Customer Assistance:
	Contact hours:
	24-Hour Power Outage:
	Fax:
	Internet web-site:

You may contact POLR Provider if you have a dispute concerning your bill or your service from POLR Provider. You must provide, in writing, within ten business days of the invoice date your reasons for disputing the invoice. You will be obligated to pay the undisputed portion of the bill and the POLR may pursue disconnection of service for nonpayment of the undisputed portion after appropriate notice. In the event that you give timely notice of a dispute, you and the POLR Provider shall, for a period of 30 calendar days following the POLR Provider's receipt of the notice, pursue diligent, good faith efforts to resolve the dispute. Following resolution of the dispute, any amount found payable by either party shall be paid within ten business days.

Complaints regarding your service may also be directed to the Public Utility Commission, 1-888-782-8477 (toll free). Complaints directed to the Public Utility Commission do not relieve customer's obligation to pay in full within 16 calendar days .

9. BILL PAYMENT METHODS

You may pay for your electric service by personal or cashier's check, money order, electronic funds transfer, automatic draft from your financial institution or in cash through a company authorized agent. If you choose to make payment by means of electronic funds transfer or automatic draft, you must contact POLR Provider' Customer Service number above to begin those options for bill payment at no cost. Regardless of the payment method you select, all payments must be made within 16 calendar days of bill issuance. If POLR Provider does not receive payments by the end of the day on the due date, the bill will be considered delinquent and a late fee of 5% will be applied to all unpaid balances including pay-in-advance.

If you have had two or more personal checks returned for insufficient funds within the past 12 months, POLR Provider will require all further payments for electric service to be by cash, cashier's check or money order.

10. FORCE MAJEURE

POLR Provider shall not be liable in damages for any act or event that is beyond its control including but not limited to, an act of God, act of the public enemy, war, insurrection, riot, fire, explosion, labor disturbance or strike, terrorism, wildlife, accident, breakdown or accident to machinery or equipment, or a valid curtailment order, regulation, or restriction imposed by governmental, military, or lawfully established civilian authorities, including any directive of the independent organization, and performance or nonperformance by the TDSP.

11. LIMITATION OF LIABILITY AND INDEMNITY

POLR PROVIDER DOES NOT GENERATE YOUR ELECTRICITY, NOR DOES POLR PROVIDER TRANSMIT OR DISTRIBUTE ELECTRICITY TO YOU. POLR PROVIDER WILL NOT BE LIABLE FOR FLUCTUATIONS, INTERRUPTIONS OR IRREGULARITIES IN BASIC FIRM SERVICE. LIABILITIES NOT EXCUSED BY REASON OF FORCE MAJEURE OR OTHERWISE SHALL BE LIMITED TO DIRECT, ACTUAL DAMAGES. NEITHER YOU NOR THE POLR PROVIDER SHALL BE LIABLE TO THE OTHER FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY, OR INDIRECT DAMAGES. THESE LIMITATIONS APPLY WITHOUT REGARD TO THE CAUSE OF ANY LIABILITY OR DAMAGE.

12. REPRESENTATIONS AND WARRANTIES

POLR PROVIDER WARRANTS THAT THE ELECTRICITY SOLD UNDER THIS AGREEMENT WILL BE "BASIC FIRM SERVICE" AS THAT TERM IS DEFINED IN PUCT SUBST. R. 25.43(c)(1), TO WIT "ELECTRIC SERVICE NOT SUBJECT TO INTERRUPTION FOR ECONOMIC REASONS AND THAT DOES NOT INCLUDE VALUE ADDED OPTIONS OFFERED IN THE COMPETITIVE MARKET. BASIC FIRM SERVICE EXCLUDES, AMONG OTHER COMPETITIVELY OFFERED OPTIONS, EMERGENCY OR BACK-UP SERVICE, AND STAND-BY SERVICE."

POLR PROVIDER MAKES NO OTHER WARRANTIES WHATSOEVER WITH REGARD TO THE PROVISION OF ELECTRIC SERVICE AND DISCLAIMS ANY AND ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

13. DISCRIMINATION

POLR Provider will not refuse to provide electric service or otherwise discriminate in the provision of electric service to any customer based on race, creed, color, national origin, ancestry, sex, marital status, lawful source of

income, disability, familial status, level of income, location of customer in an economically distressed geographic area, or qualification for low-income or energy efficiency services.

You have the right to cancel this agreement (Standard Terms of Service) for electric service without penalty or fee of any kind for a period of three federal business days after you have received the Standard Terms of Service. You may cancel your service and this agreement by calling the toll free Customer Service number during the hours stated in this Standard Terms of Service. Service may also be cancelled by toll-free fax or e-mail. ***Canceling this service agreement will result in disconnection of service if you have not made arrangements for alternative supply.***

Figure: 16 TAC §82.120(b)

CURRICULUM FOR THE TEACHER'S CERTIFICATE 1,000 HOURS - MINIMUM OF 26 WEEKS			
(1)	instruction in theory, consisting of		125 hours
	(A)	lesson planning	15
	(B)	personality and professional conduct	15
	(C)	development of a barber course	15
	(D)	student learning principles	10
	(E)	principles of teaching	10
	(F)	basic teaching methods	10
	(G)	teaching aids	10
	(H)	testing	10
	(I)	Self evaluation	10
	(J)	teaching adults	10
	(K)	classroom problems	5
	(L)	classroom management	5
(2)	instruction in practical work, consisting of		875 hours
	(A)	assisting with senior students	346
	(B)	assisting with junior students	321
	(C)	theory class (assisting teacher, observing, teaching)	133
	(D)	learning office procedures and state laws	50
	(E)	grading test papers (assisting teacher, observing, grading)	25

Figure: 16 TAC §82.120(c)

CURRICULUM FOR THE CLASS A BARBER CERTIFICATE 1,500 HOURS - MINIMUM OF NINE MONTHS				
(1)	theory, consisting of			180 hours
	(A)	anatomy, physiology, and histology, consisting of the study of		50 hours
		(i)	Hair	
		(ii)	Skin	
		(iii)	Muscles	
		(iv)	Nerves	
		(v)	Cells	
		(vi)	circulatory system	
		(vii)	Digestion	
		(viii)	Bones	
	(B)	Texas barber law and rules		35
	(C)	bacteriology, sterilization, and sanitation		30
	(D)	disorders of the skin, scalp, and hair		10
	(E)	Salesmanship		5
	(F)	barbershop management		5
	(G)	chemistry		5
	(H)	Shaving		5
	(I)	scalp, hair treatments and skin		5
	(J)	Sanitary professional techniques		4
	(K)	professional ethics		4
	(L)	Scientific fundamentals of barbering		4
	(M)	cosmetic preparations		3
	(N)	shampooing and rinsing		2
	(O)	cutting and processing curly and over-curly hair		2
	(P)	haircutting, male and female		2
	(Q)	theory of massage of scalp, face and neck		2
	(R)	hygiene and good grooming		1
	(S)	barber implements		1
	(T)	honing and stropping		1
	(U)	mustaches and beards		1
	(V)	facial treatments		1
	(W)	electricity and light therapy		1
	(X)	history of barbering		1
(2)	instruction in practical work, consisting of the study of:			1320 hours
	(A)	dressing the hair, consisting of:		800
		(i)	men's haircutting	
		(ii)	children's haircutting	
		(iii)	women's haircutting	
		(iv)	Cutting and processing curly and over-curly hair	
		(v)	razor cutting	
	(B)	Shaving		80

	(C)	Styling	55
	(D)	shampooing and rinsing	40
	(E)	bleaching and dyeing of the hair	30
	(F)	waving hair	28
	(G)	Straightening	25
	(H)	Cleansing	25
	(I)	professional ethics	22
	(J)	barbershop management	22
	(K)	hair weaving and hairpieces	17
	(L)	Processing	15
	(M)	Clipping	15
	(N)	beards and mustaches	15
	(O)	Shaping	15
	(P)	Dressing	15
	(Q)	Curling	15
	(R)	first aid and safety precautions	11
	(S)	scientific fundamentals of barbering	10
	(T)	barber implements	10
	(U)	haircutting or the process of cutting, tapering, trimming, processing, and molding and scalp, hair treatments, and tonics	10
	(V)	Massage and facial treatments	10
	(W)	Arranging	10
	(X)	Beautifying	10
	(Y)	Singeing	7
	(Z)	Manicuring	8

Figure: 16 TAC §82.120(d)

CURRICULUM FOR THE MANICURIST LICENSE 600 HOURS - MINIMUM OF 16 WEEKS			
(1)	instruction in theory, consisting of		45 hours
	(A)	bacteriology, sterilization, and sanitation	16
	(B)	manicuring, equipment, and procedures	4
	(C)	the nail and disorders	4
	(D)	Texas barber law and rules	4
	(E)	anatomy and physiology	4
	(F)	skin	4
	(G)	professional ethics	3
	(H)	hygiene and good grooming	3
	(I)	advanced nail techniques	3
(2)	instruction in practical work, consisting of:		555 hours
	(A)	shaping nails	96
	(B)	applying polish	74
	(C)	trimming cuticle and buffing nails	59
	(D)	hand and arm massage	57
	(E)	removal of polish	57
	(F)	application of artificial and gel nails	44
	(G)	applying cuticle remover and loosening	40
	(H)	preparation of manicure table	40
	(I)	softening cuticle	37
	(J)	Bleaching under free edge	18
	(K)	cleaning under free edge	18
	(L)	applying cuticle oil or cream	15

Figure: 16 TAC §82.120(e)

CURRICULUM FOR THE BARBER TECHNICIAN LICENSE 300 HOURS - MINIMUM OF EIGHT WEEKS			
(1)	instruction in theory, consisting of		45 hours
	(A)	hygiene, bacteriology, sterilization, and sanitation	18
	(B)	common disorders of the skin; facial treatments	4
	(C)	shampooing, equipment, and procedures	4
	(D)	Texas barber law and rules	4
	(E)	cosmetic applications and massage	3
	(F)	professional ethics	3
	(G)	good grooming; preparing patron and making appointments	3
	(H)	theory of massage, and structure of head, neck, and face	2
	(I)	rinsing, types and procedures	2
	(J)	scalp and hair treatments	2
(2)	instruction in practical work, consisting of		255 hours
	(A)	application of shampoo and shampooing	45
	(B)	application of rinses and removal	35
	(C)	makeup application	33
	(D)	facial manipulations	20
	(E)	application of conditioner and rinsing	20
	(F)	scalp manipulations	20
	(G)	brushing and drying	18
	(H)	sanitation and sterilization	15
	(I)	draping and scalp examination	11
	(J)	application and removal of creams	10
	(K)	application and removal of packs	8
	(L)	set-up for facial	8
	(M)	preparation of work area for shampooing	7
	(N)	patron protection	5

Figure: 16 TAC §82.120(f)

CURRICULUM FOR A BARBER REFRESHER COURSE 300 HOURS			
(1)	theory instruction in Texas barber law and rules		10 hours
(2)	instruction in practical work, to include		290 hours
	(A)	Haircutting	160
	(B)	Permanent waving and chemical application	75
	(C)	styling, curling, and blow-drying	55

Figure: 16 TAC §83.120(a)

OPERATOR CURRICULA

PRIVATE AND PUBLIC POST-SECONDARY COSMETOLOGY SCHOOLS (1500 hours)		
(A)	haircutting, styling and related theory	500 hours
(B)	hair coloring and related theory	200 hours
(C)	cold waving and related theory	200 hours
(D)	orientation, rules and laws	100 hours
(E)	manicuring and related theory	100 hours
(F)	shampoo and related theory	100 hours
(G)	Chemistry	75 hours
(H)	salon management and practices	75 hours
(I)	hair and scalp treatment and related theory	50 hours
(J)	chemical hair relaxing and related theory	50 hours
(K)	facials and related theory	50 hours
PUBLIC SECONDARY PROGRAMS FOR HIGH SCHOOL STUDENTS (1,000 HOURS)		
(A)	haircutting, styling, and related theory	400 hours
(B)	hair coloring and related theory	150 hours
(C)	cold waving and related theory	100 hours
(D)	manicuring and related theory	100 hours
(E)	orientation, rules and laws	75 hours
(F)	shampoo and related theory	75 hours
(G)	chemical hair relaxing and related theory	50 hours
(H)	facials and related theory	25 hours
(I)	hair and scalp treatment and related theory	25 hours

Figure: 16 TAC §83.120(b)

SPECIALIST CURRICULA

FACIAL CURRICULUM (750 hours)		
(A)	facial treatment, cleansing, masking, therapy	225 hours
(B)	anatomy and physiology	90 hours
(C)	electricity, machines, and related equipment	75 hours
(D)	Makeup	75 hours
(E)	orientation, rules and laws	50 hours
(F)	Chemistry	50 hours
(G)	care of client	50 hours
(H)	sanitation, safety, and first aid	40 hours
(I)	Management	35 hours
(J)	superfluous hair removal	25 hours
(K)	aroma therapy	15 hours
(L)	Nutrition	10 hours
(M)	color psychology	10 hours
MANICURE CURRICULUM (600 HOURS)		
(A)	procedures:	320 hours
	basic manicure and pedicure, oil manicure, removal of stains, repair work, hand and arm massage, buffing, application of polish, application of artificial nails, application of cosmetic fingernails, preparation to build new nail, and application of nail extensions, sculptured nails, tips, wraps, fiberglass/gels and odorless products	
(B)	bacteriology, sanitation and safety:	100 hours
	definitions, importance, rules, laws, methods, safety measures, hazardous chemicals and ventilation odor in salons	
(C)	professional practices:	80 hours
	manicuring as a profession, vocabulary, ethics, salon procedures, hygiene and grooming, professional attitudes, salesmanship and public relations	
(D)	arms and hands:	70 hours
	major bones and functions, major muscles and functions, major nerves and functions, skin structure, functions, appendages, conditions and lesions, nails structure, composition, growth, regeneration, irregularities and diseases	
(E)	orientation, rules, laws and preparation	15 hours
(F)	equipment, implements and supplies	15 hours

HAIR BRAIDING CURRICULUM (35 HOURS)		
(A)	Hair Braiding - Technical Skills:	11 hours
	(i) tools and equipment: types of combs, yarn, thread (ii) types and patterns of braids: twists, knots, multiple strands, corn rows, hair locking (iii) artificial hair and materials for extensions (iv) trimming of artificial hair only as applicable to the braiding process (v) braid removal and scalp care (vi) client education: maintenance	
(B)	Health and Safety/Law and Rules:	16 hours
	(i) Texas health and safety law and rules (ii) bacteriology: sanitation, and disinfection (iii) viruses, diseases, disorders: transmission, control, recognition (iv) Texas license requirements – individuals and salons (v) Texas professional responsibility requirements individuals and salons (vi) Texas Occupations Code, Chapters 1602 and 1603 (laws) (vii) 16 Texas Administrative Code, Chapter 83 (rules)	
(C)	Hair Analysis and Scalp Care:	8 hours
	(i) hair and scalp disorders and diseases: dandruff, alopecia, fungal infections, infestations, infections (ii) hair structure, composition, texture (iii) hair growth patterns, styles, textures (iv) effect of physical treatments on the hair	
HAIR WEAVING CURRICULUM (300 HOURS)		
(A)	Hair weaving :	150 hours
	Basic hair weaving, repair on hair weaving, removal of weft, sizing and finishing by hand of hair ends or by using mechanical equipment	
(B)	shampooing client, weft and extensions:	50 hours
	Basic shampooing, basic conditioners, semi-permanent and weakly rinses, basic hair drying, draping	

(C)	professional practices:	40 hours
	Hair weaving as a profession, vocabulary, ethics, salon procedures, hygiene, grooming, professional attitudes, salesmanship, public relations, hair weaving/braiding skills, including purpose, effect, equipment, implements, supplies, and preparation	
(D)	anatomy and physiology-scalp:	30 hours
	major bones and functions, major muscles and functions, major nerves and functions, skin structures, functions, appendages, conditions and lesions, hair or fiber used, structure, composition, hair regularities, hair and scalp diseases	
(E)	chemistry in hair weaving:	10 hours
	elements, compounds, and mixtures, composition and uses of cosmetics in hair weaving	
(F)	sanitation and safety measures:	10 hours
	definitions, importance, sanitary rules and laws, sterilization methods of unused hair and fiber droppings	
(G)	safety measures: client protection	10 hours
WIG CURRICULUM (300 HOURS)		
(A)	combing out	50 hours
(B)	Styling	50 hours
(C)	Coloring, tinting, bleaching	37 hours
(D)	Rolling	30 hours
(E)	cutting and shaping, scissors and razor	20 hours
(F)	hot iron	19 hours
(G)	Cleaning	10 hours
(H)	alterations, installation of elastic	10 hours
(I)	Conditioning	10 hours
(J)	brushing technique prior to styling	10 hours
(K)	identification and recognition definition-wigs, wiggery, wigology-pertaining to any human, synthetic, or animal hairpiece	10 hours
(L)	sanitation, disinfecting, required rules and laws	10 hours
(M)	eye tabbing	10 hours
(N)	Sizing	5 hours
(O)	Drying	5 hours
(P)	measuring head for proper size	5 hours
(Q)	preparation of wig on block	5 hours
(R)	history, background, and salesmanship	3 hours
(S)	knowledge of coloring: J L	1 hour

SHAMPOO AND CONDITIONING CURRICULUM (150 HOURS)		
(A)	procedures:	100 hours
	Basic shampooing techniques on all types of shampoo, application and removal of all types of conditioners, removal of hair color stains; application of weekly rinses or semi-permanent rinses, removal of bleaches requiring shampoo, scalp and neck massage, removing hair tints requiring shampoo, cleansing and conditioning of all hair goods, hair and scalp analysis, and scalp and hair manipulations	
(B)	Scalp and neck, anatomy and physiology:	10 hours
	major bones and functions; major muscles and functions, major nerves and functions, major blood vessels and functions, skin structure, functions, appendages, conditions and lesions	
(C)	chemistry of shampoo and conditioner	10 hours
	elements, compounds, mixtures, acid and alkali (pH), chemistry of water, composition and uses of shampoo and conditioner	
(D)	sanitation and safety:	10 hours
	definitions, rules, laws, and methods	
(E)	shampooing and conditioning skills:	10 hours
	purposes and effects, preparation, equipment, implements and supplies	
(F)	professional practices	5 hours
	shampooing as a profession, vocabulary and ethics	
(G)	salon procedures:	5 hours
	hygiene, grooming, professional attitudes, salesmanship and public relations	

Figure: 16 TAC §83.120(c)

INSTRUCTOR CURRICULA

INSTRUCTOR CURRICULUM (750 HOURS)		
(A)	instruction and theory and lab/clinic operation	350 hours
(B)	teaching and lab/clinic management	350 hours
(C)	orientation, rules and laws	50 hours
INSTRUCTOR CURRICULUM WITH TWO YEARS EXPERIENCE (250 HOURS)		
(A)	lesson plans	60 hours
(B)	methods of teaching	60 hours
(C)	classroom management	30 hours
(D)	evaluation techniques	30 hours
(E)	state laws and forms	20 hours
(F)	visual aids preparation and use	20 hours
(G)	learning theory	20 hours
(H)	orientation, rules, and laws	10 hours

Figure: 16 TAC §83.120(d)

PRACTICAL APPLICATIONS OF THE CURRICULUM

Each cosmetology student must complete practical applications of the curriculum according to the school's published rules on minimum practical applications or by the following schedule, whichever is greater		
(A)	client protection	600 applications
(B)	hairdressing: arranging, cutting, dressing, shampooing, curling, pressing, and fingerwaving	600 applications
(C)	Sanitation	500 applications
(D)	haircoloring: temporary, semi-permanent, permanent, bleaching and dimensional, coloring, color mixing	100 applications
(E)	chemical hair services: minimum of 15 services in each category: (i) restructuring (ii) permanent waving (iii) straightening and relaxing	100 applications
(F)	facials: minimum of 5 services in each category: (i) skin analysis and care (ii) manipulation and massage (iii) skin care (iv) removal of hair by wax, tweezers, or depilatories (v) make-up and brow arch	30 applications
(G)	Scalp and hair treatments	30 applications
(H)	manicuring and pedicuring	30 applications
THE ABOVE PRACTICAL APPLICATIONS MAY BE PERFORMED ON A MANNEQUIN, A STUDENT OR A PATRON AND MOCK APPLICATIONS MAY BE USED WHERE APPROPRIATE AND NECESSARY. IT SHALL BE THE RESPONSIBILITY OF THE STUDENT TO KEEP A RECORD OF THE NUMBER OF PRACTICAL APPLICATIONS PERFORMED, BUT SHALL BE VERIFIED BY AN INSTRUCTOR SIGNATURE.		

Figure: 19 TAC §33.5(l)(2)(J)(iii)

REPORT OF EXPENDITURES OF PERSONS PROVIDING SERVICES TO THE STATE BOARD OF EDUCATION RELATING TO THE MANAGEMENT AND INVESTMENT OF THE PERMANENT SCHOOL FUND

January 1, [~~December 1,~~] _____ through December 31, [~~November 30,~~] _____

Individual making report _____

Employer _____

Position _____

Services Rendered to SBOE _____

Transaction 1.

DATE _____

AMOUNT, if greater than $50.00 _____

NAME OF PERSON(S) (SBOE MEMBER, COMMISSIONER, EMPLOYEE)

_____

DETAILED DESCRIPTION OF EXPENDITURE _____

_____

_____

_____

Transaction 2.

DATE _____

AMOUNT, if greater than $50.00 _____

NAME OF PERSON(S) (SBOE MEMBER, COMMISSIONER, EMPLOYEE)

_____

DETAILED DESCRIPTION OF EXPENDITURE _____

_____

_____

_____

Transaction 3.

DATE _____

AMOUNT, if greater than $50.00 _____

NAME OF PERSON(S) (SBOE MEMBER, COMMISSIONER, EMPLOYEE)

_____

DETAILED DESCRIPTION OF EXPENDITURE _____

_____

_____

_____

Figure: 30 TAC §101.506(b)(2)(C)

$$HI = \left[\left(O \times 3{,}414\, Btu/kWh\right) + \left(\frac{HE}{0.8}\right)\right] \div 1{,}000{,}000\, Btu/MMBtu$$

Where:

Btu	=	British thermal units
HE	=	the total heat energy, in Btu, of the steam produced by any associated heat recovery steam generator during the control period.
HI	=	the converted heat input, in MMBtu, of the combustion turbine cogeneration unit.
kWh	=	kilowatt-hour
MMBtu	=	million British thermal units
O	=	the gross electrical output during the control period of the enclosed device comprising the compressor, combustor, and turbine.

Figure: 30 TAC §101.506(b)(3)(C)

$$HI = \left[\left(O \times 3{,}414\, Btu/kWh\right) + \left(\frac{HE}{0.8}\right)\right] \div 1{,}000{,}000\, Btu/MMBtu$$

Where:

Btu	=	British thermal units
HE	=	the total heat energy, in Btu, of the steam produced by any associated heat recovery steam generator during the control period.
HI	=	the converted heat input, in MMBtu, of the combustion turbine cogeneration unit.
kWh	=	kilowatt-hour
MMBtu	=	million British thermal units
O	=	the gross electrical output during the control period of the enclosed device comprising the compressor, combustor, and turbine.

Figure: 30 TAC §101.506(c)

$$A = \frac{HI}{\sum_{i=1}^{n} HIi} \times B$$

Where:

A	=	the amount of Clean Air Interstate Rule (CAIR) oxides of nitrogen (NO_x) allowances allocated to a CAIR NO_x unit rounded to the nearest whole allowance.
i	=	each CAIR NO_x unit qualifying for an allocation under this subsection.
n	=	the total number of CAIR NO_x units qualifying for an allocation under this subsection.
HI	=	the baseline heat input for a CAIR NO_x unit qualifying for an allocation under this subsection as calculated under subsection (a) or (b)(2) or (3) of this section.
B	=	a total amount of CAIR NO_x allowances equal to 90.5% of the NO_x trading budget identified in subsection (a) of this section, except as provided in subsection (e) of this section.

Figure: 30 TAC §101.506(d)(4)(D)

$$A = \frac{RQ}{\sum_{i=1}^{n} RQi} \times SA$$

Where:

A	=	the amount of Clean Air Interstate Rule (CAIR) oxides of nitrogen (NO_x) allowances, rounded to the nearest whole allowance, allocated to each CAIR NO_x unit covered under a CAIR NO_x allowance allocation request accepted by the executive director.
i	=	each CAIR NO_x allowance allocation request accepted by the executive director.
n	=	the total number of CAIR NO_x allowance allocation requests accepted by the executive director.
RQ	=	the amount of the CAIR NO_x allowances requested, as adjusted under subparagraph (A) of this paragraph, for each CAIR NO_x unit covered under a CAIR NO_x allowance allocation request accepted by the executive director.
SA	=	the total amount of CAIR NO_x allowances in the new unit set-aside identified under §101.503(b) of this title (relating to Clean Air Interstate Rule Oxides of Nitrogen Annual Trading Budget).

Figure: 30 TAC §101.508(d)(3)

$$A = \frac{RQ}{\sum_{i=1}^{n} RQi} \times SP$$

Where:

A	=	the number of Clean Air Interstate Rule (CAIR) oxides of nitrogen (NO_x) allowances, rounded to the nearest whole allowance, allocated from the compliance supplement pool to a unit covered under a compliance supplement pool allocation request accepted by the executive director.
i	=	each compliance supplement pool allocation request accepted by the executive director.
n	=	the total number of compliance supplement pool allocation requests accepted by the executive director.
RQ	=	the amount of CAIR NO_x allowances requested for the unit under subsection (b) or (c) of this section, as adjusted under paragraph (1) of this subsection.
SP	=	the amount of CAIR NO_x allowances in the compliance supplement pool.

Figure: 30 TAC §285.33(d)(3)(E)(i)

A(d) = minimum required distribution absorptive area in square feet

Q = design wastewater usage rate in gallons per day

R(a) = most restrictive application rate between the fill material or the soil surface if the soil surface is within four inches of the bottom of the distribution media. The application rate is in gallons per square foot per day.

Figure: 30 TAC §285.33(d)(3)(F)

A(b) = minimum required basal absorptive area in square feet

Q = design wastewater usage rate in gallons per day

R(a) = application rate of the native soil surface in gallons per square foot per day.

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439 - 1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of July 7, 2006, through July 13, 2006. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on July 19, 2006. The public comment period for these projects will close at 5:00 p.m. on August 18, 2006.

FEDERAL AGENCY ACTIONS:

Applicant: Reef Exploration, Inc.; Location: The project is located in wetlands adjacent to the South Fork of Taylor Bayou, north of State Highway 73, approximately 0.5 mile west of the Levi Gully outfall into Taylor Bayou, in Jefferson County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Alligator Hole Marsh, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 383732; Northing: 3301363. Project Description: The applicant proposes to construct a 300 by 300-foot (2.066-acre) drilling pad to explore for hydrocarbons at the Levingston #1 Well. Approximately 2,311 cubic yards of native material will be discharged into wetlands to construct the site. In addition, a ring levee will be constructed. The wetlands are dominated by bald cypress (Taxodium distichum), American bulrush (Scirpus pungens), coastal plain willow (Salix caroliniana), prostrate smartweed (Polygonum aviculare), large leaf pennywort (Hydrocotyle bonariensis), and black tupelo (Nyssa sylvatica). CCC Project No.: 06-0342-F1; Type of Application: U.S.A.C.E. permit application #24247 is being evaluated under §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Railroad Commission under §401 of the Clean Water Act.

Applicant: Jefferson County Engineering Department; Location: The project site is located in wetlands adjacent to Keith Lake, just north of the Keith Lake Fish Pass, in Jefferson County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Port Arthur South, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 408490; Northing: 3293773. Project Description: The applicant is requesting authorization to construct a public boat launch with parking facilities and park amenities near Keith Lake, in Jefferson County, Texas. The Keith Lake Boat Launch and Parking Facility will be constructed within a 65-acre wetland area just north of the Keith Lake Fish Pass. Activities include the construction of a 24-foot-wide roadway beginning at State Highway 87 and terminating at the proposed parking lot; the construction of a 1,600-square-foot parking facility; the construction of a 3-lane boat ramp; and the dredging of a boat launch and access channel into Keith Lake. A total of 2.35 acres of emergent wetland habitat will be impacted as a result of the proposed activities. The lagoon launch and access channel will be dredged to a depth of -5.5 feet. To mitigate for impacts to the aquatic environment, the applicant will create 4.96 acres of estuarine marsh habitat near the proposed access channel. This project has been designed in collaboration with the Texas Parks and Wildlife Department. CCC Project No.: 06-0347-F1; Type of Application: U.S.A.C.E. permit application #23995 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act.

Applicant: National Offshore L.P.; Location: The project is located in Galveston Bay, State Tract (ST) 72 in Chambers County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Umbrella Point, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 320401; Northing: 3280566. Project Description: The applicant proposes to add an additional offset well location (ST 72, Well No. 4) 100 feet from the location authorized under Department of the Army (DA) Permit 23851 (ST 72, Well No. 1). To minimize impact, the offset location (ST 72, Well No. 4), if drilled, would only contain the wellhead and structures necessary for the protection of said wellhead. All other associated structures and equipment would be located on the location originally permitted under DA Permit 23851. After further study, the applicant has concluded that placing a 12-inch-diameter pipeline in the approved Right-of-Way (ROW) under DA Permit 23851(01) would not be beneficial to the development of the area. To continue with this type of gathering system would require the overall environmental footprint to multiply because each additional producing well would have to have its own metering platform and a separate tie-in into the 12-inch pipeline. Therefore, the applicant requests authorization to amend the permit so that the originally proposed 12-inch pipeline would be replaced with multiple smaller pipelines (up to six 6-inch and one 3-inch), each being dedicated to a particular well, and then bundled into the same ROW leading back to an already existing production platform. This would significantly reduce impacts by doing away with the need of individual metering facilities on each of the wells. This, in turn, would remove the need for large individual platforms, reduce the risk of large spills due to the increase of containment individual lines provide, and maximize the use of already existing infrastructure. Large vessel traffic would also be reduced because the majority of vessels would go to the existing production platform. CCC Project No.: 06-0348-F1; Type of Application: U.S.A.C.E. permit application #23851(02) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Railroad Commission under §401 of the Clean Water Act.

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451 - 1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies

and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Ms. Tammy Brooks, Consistency Review Coordinator, Coastal Coordination Council, P. O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-200603783
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: July 18, 2006

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Comptroller of Public Accounts

Certification of the Average Taxable Price of Gas and Oil

The Comptroller of Public Accounts, administering agency for the collection of the Crude Oil Production Tax, has determined that the average taxable price of crude oil for reporting period July 2006, as required by Tax Code, §202.058, is $64.94 per barrel for the three-month period beginning on April 1, 2006, and ending June 30, 2006. Therefore, pursuant to Tax Code, §202.058, crude oil produced during the month of July 2006, from a qualified Low-Producing Oil Lease, is not eligible for exemption from the crude oil production tax imposed by Tax Code, Chapter 202.

The Comptroller of Public Accounts, administering agency for the collection of the Natural Gas Production Tax, has determined that the average taxable price of gas for reporting period July 2006, as required by Tax Code, §201.059, is $5.75 per mcf for the three-month period beginning on April 1, 2006, and ending June 30, 2006. Therefore, pursuant to Tax Code, §201.059, gas produced during the month of July 2006, from a qualified Low-Producing Well, is not eligible for exemption from the natural gas production tax imposed by Tax Code, Chapter 201.

Inquiries should be directed to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

TRD-200603800
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Filed: July 19, 2006

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.009, and 304.003, Tex. Fin. Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 07/24/06 - 07/30/06 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 07/24/06 - 07/30/06 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 08/01/06 - 08/31/06 is 8.25% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 08/01/06 - 08/31/06 is 8.25% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment or other similar purpose.

TRD-200603799
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: July 19, 2006

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Credit Union Department

Notice of Final Action Taken

In accordance with the provisions of 7 TAC Section 91.103, the Credit Union Department provides notice of the final action taken on the following applications:

Applications to Expand Field of Membership--Approved

First Service Credit Union, Houston, Texas--See *Texas Register* issue dated March 31, 2006.

Lincoln City Credit Union, Houston, Texas--See *Texas Register* issue dated March 31, 2006.

Articles of Incorporation - 50 Years to Perpetuity--Approved

Public Employees Credit Union, Austin, Texas

Star of Texas Credit Union, Austin, Texas

San Jacinto Area Credit Union, Pasadena, Texas

Sears Waco Credit Union, Waco, Texas

Corner Stone Credit Union, Lancaster, Texas

E E South Texas Credit Union, Corpus Christi, Texas

United Savers Trust Credit Union, Houston, Texas

Coburn Credit Union, Beaumont, Texas

Doches Credit Union, Nacogdoches, Texas

Beaumont Municipal Employees Credit Union, Beaumont, Texas

Texas Health Credit Union, Austin, Texas

TRD-200603806
Harold E. Feeney
Commissioner
Credit Union Department
Filed: July 19, 2006

♦ ♦ ♦

Commission on State Emergency Communications

Notice of Joint Prehearing Conference

SOAH DOCKET NO. 477-06-2682 and 477-06-2683

The Commission on State Emergency Communications ("CSEC") will render an order on the applicability of Texas Health and Safety Code Annotated §771.0711 to all "wireless telecommunications connections" provided by wireless service providers in Texas regardless of the methodology of service by which wireless service is rendered (e.g. prepaid, postpaid, monthly or annual contracts). The legal question has arisen in conjunction with a request for refund by Tracfone Wireless

before the Texas Comptroller of Public Accounts ("Comptroller"). Tracfone's request was abated for CSEC to issue a ruling pursuant to Texas Attorney General Opinion (GA-0401). Virgin Mobile has also filed a similar refund request before the Comptroller. CSEC has referred two dockets to the State Office of Administrative Hearings ("SOAH") on this legal threshold issue.

A joint prehearing conference will be held before an Administrative Law Judge with the State Office of Administrative Hearings on Tuesday, August 22, 2006, at 9 a.m., at the W.P. Clements Building, 4th floor, 300 West 15th Street, Austin, Texas. The purpose of the prehearing conference will be to discuss and/or determine the following preliminary issues:

1. additional notice, if any, to be made in these dockets;

2. general procedural issues;

3. whether a decision on the legal issues and the applicability of the statute is necessary prior to any factual findings;

4. the factual issues in dispute and need for an evidentiary hearing, if any;

5. establishment of a briefing schedule and a hearing if necessary; and

6. the motions filed with the Judge at SOAH by August 17, 2006.

CSEC's ruling on the threshold legal issue and the applicability of the statute to all "wireless telecommunications connections" will impact CSEC and Comptroller enforcement regarding the remittance of current, past and future wireless fees. Alternately, the ruling will also have an impact on potential refunds for previously remitted amounts by wireless service providers.

Respectfully Submitted by Paul Mallett, Executive Director, Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942

Please direct all questions to CSEC Counsel of Record:

Rupaco T. Gonzalez, Jr.

The Gonzalez Law Firm, P.C.

8127 Mesa Drive, Suite B206, PMB #117

Austin Texas 78759

(512) 921-7726 (voice)

(512) 241-0851 (fax)

gonzalezlawfirm@austin.rr.com

TRD-200603812
Paul Mallett
Executive Director
Commission on State Emergency Communications
Filed: July 19, 2006

♦ ♦ ♦

Employees Retirement System of Texas

Request for Proposals

TEXAS EMPLOYEES GROUP BENEFITS PROGRAM

In accordance with Sections 1551.055 and 1551.062 of the Texas Insurance Code, the Employees Retirement System of Texas (ERS) is issuing a Request for Proposal (RFP) to conduct an audit of the Carriers, HMOs and third party administrators of the benefit plans provided to participants of the Texas Employees Group Benefits Program (GBP). Following ERS' selection of a qualified provider(s) of auditing services, audit responsibilities will begin for Fiscal Year 2006 and continue annually through August 31, 2009, subject to and in accordance with the contract terms.

ERS is the administrator for the GBP as provided in Chapter 1551 of the Texas Insurance Code. The GBP covers over 500,000 state agency and certain higher education employees, retirees, and dependents. ERS is responsible for contracting with health, dental, life, and disability carriers, and third party administrators to provide coverage for GBP participants or administer such coverage throughout the state of Texas. The services requested and described in the RFP include auditing claims administration, contract compliance, gross and net costs and administrative costs of the providers and administrators specified in the RFP.

The RFP will be available after late July from the ERS' website, (www.ers.state.tx.us). To access the secured portion of the RFP website, interested Auditors must email their request to the attention of Araceli (Sally) Garcia at: araceli.garcia@ers.state.tx.us. The email request must include the Auditor's legal name, street address, phone and fax numbers, and an email address for the organization's direct point of contact. Upon receipt of your emailed request, a user ID and password will be issued to the requesting organization that will permit access to the secured RFP. General questions concerning the RFP should be sent to the ivendorquestions mailbox at: https://www1.ers.state.tx.us/vendorbid/. Inquires and responses are updated frequently.

To be eligible for consideration, the Auditor is required to submit a sealed proposal as more fully specified in the RFP.

ERS will base its evaluation and selection of an award on the basis of demonstrated competence, compliance with the RFP and qualifications to perform the services for a fair and reasonable price. The professional fees under any contract must be consistent with and not higher than the recommended practices and fees published by the applicable professional associations and may not exceed any maximum provided by law. Further, the Auditor will be evaluated on factors including, but not limited to the following, which are not necessarily listed in order of priority: compliance with and adherence to the RFP and execution of the Contract; minimum and preferred requirements as specified; Fee Proposal; references; and other factors, as determined during the evaluation process. Each proposal will be individually evaluated relative to other Audit proposals.

ERS reserves the right to reject any or all proposals and call for new proposals if deemed by ERS to be in the best interests of ERS, the GBP and its participants. ERS also reserves the right to reject any proposal submitted that does not fully comply with the RFP's instructions and criteria. ERS is under no legal requirement to execute a contract on the basis of this notice or upon issuance of the RFP and will not pay any costs incurred by any entity in responding to this notice or the RFP or in connection with the preparation thereof. ERS specifically reserves the right to vary all provisions set forth at any time prior to execution of a contract where ERS deems it to be in the best interest of the GBP and its participants.

TRD-200603814
Paula A. Jones
General Counsel
Employees Retirement System of Texas
Filed: July 19, 2006

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on

the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 required that, before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **August 28, 2006**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P. O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on August 28, 2006**. Comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: AAA Industrial Chromium Company; DOCKET NUMBER: 2005-1916-IHW-E; IDENTIFIER: Regulated Entity Reference Number (RN) RN103156006; LOCATION: Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: chrome and copper plating; RULE VIOLATED: 30 TAC §335.62 and §335.513(a) and 40 Code of Federal Regulations (CFR) §262.11, by failing to conduct hazardous waste determinations and to maintain documentation on each waste stream; 30 TAC §335.6(c), by failing to update the notice of registration; 30 TAC §335.69(a)(4) and 40 CFR §§265.16, 265.51, and 265.55, by failing to have documentation for personnel training and contingency plan; 30 TAC §335.474, by failing to have a source reduction and waste minimization plan; 30 TAC §335.4, by failing to prevent an unauthorized discharge of industrial solid waste; 30 TAC §335.69(a)(1)(B) and (3), (d)(1) and (2), and 40 CFR §§262.34(a)(3) and (c)(1)(ii), 265.173(a), 265.192, and 265.193, by failing to obtain a structural integrity tank system assessment by a registered professional engineer, by failing to meet secondary containment requirements for each tank, by failing to label or mark clearly the words "hazardous waste" or words to identify the contents on each tank accumulating waste, and by failing to keep satellite waste containers closed during storage; and 30 TAC §335.2(a), by failing to obtain authorization to store hazardous waste at the facility; PENALTY: $35,567; ENFORCEMENT COORDINATOR: Cari-Michel LaCaille, (512) 239-1387; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Arlamar LLC dba Kwik Kar Lube; DOCKET NUMBER: 2005-0922-PST-E; IDENTIFIER: RN100539741; LOCATION: Arlington, Tarrant County, Texas; TYPE OF FACILITY: petroleum storage tank; RULE VIOLATED: 30 TAC §334.50(b)(1)(A), by failing to provide release detection; PENALTY: $1,750; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: City of Brazoria; DOCKET NUMBER: 2006-0502-MWD-E; IDENTIFIER: RN101613552; LOCATION: Brazoria, Brazoria County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0014581001, Effluent Limitations and Monitoring Requirements Numbers 1 and 6, and the Code, §26.121(a), by failing to comply with the permitted effluent limits for ammonia-nitrogen (NH3N), total suspended solids (TSS), five-day carbonaceous biochemical oxygen demand (CBOD5), flow, and dissolved oxygen (DO); PENALTY: $5,112; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(4) COMPANY: City of Burnet; DOCKET NUMBER: 2006-0598-PWS-E; IDENTIFIER: RN100824895; LOCATION: Burnet, Burnet County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(5) and THSC, §341.0315(c), by exceeding the maximum contaminant level for haloacetic acid; PENALTY: $665; ENFORCEMENT COORDINATOR: Epifanio Villareal, (210) 490-3096; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(5) COMPANY: Ronnie Butler dba Butler and Perry; DOCKET NUMBER: 2006-0258-PST-E; IDENTIFIER: RN101793958; LOCATION: San Augustine, San Augustine County, Texas; TYPE OF FACILITY: station with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(c)(2)(C) and (4) and the Code, §26.3475(d), by failing to inspect the impressed current cathodic protection system at least every 60 days and by failing to inspect and test the cathodic protection system for operability and adequacy of protection; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor underground storage tanks (USTs) for releases; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs; 30 TAC §334.7(d)(3), by failing to provide written notice of any change or additional information to the commission; and 30 TAC §334.8(c)(4)(B) and (5)(A)(i) and (B)(ii), and the Code, §26.3467(a), by failing to timely renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form and by failing to make available to a common carrier a valid, current delivery certificate; PENALTY: $10,500; ENFORCEMENT COORDINATOR: Deana Holland, (512) 239-2504; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(6) COMPANY: Cal Farleys Girlstown USA; DOCKET NUMBER: 2004-1165-PST-E; IDENTIFIER: RN102343191; LOCATION: Whiteface, Cochran County, Texas; TYPE OF FACILITY: non-profit girls home; RULE VIOLATED: 30 TAC §334.50(d)(1)(B)(ii), by failing to reconcile inventory control records on a monthly basis; and 30 TAC §290.51(a)(3), by failing to pay public health service fees; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(7) COMPANY: Carbon Silica Partners, L.P. dba Diamond Fiberglass Fabricators; DOCKET NUMBER: 2006-0615-AIR-E; IDENTIFIER: RN100219443; LOCATION: Victoria, Victoria County, Texas; TYPE OF FACILITY: fiberglass tank manufacturing; RULE VIOLATED: 30 TAC §122.145(2)(B) and §122.146(5)(D) and THSC, §382.085(b), by failing to submit a six-month deviation report; PENALTY: $2,000; ENFORCEMENT COORDINATOR: John Muennink, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christie, Texas 78412-5503, (361) 825-3100.

(8) COMPANY: City of Commerce; DOCKET NUMBER: 2006-0298-MWD-E; IDENTIFIER: RN102178233; LOCATION: Commerce, Hunt County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and (17), TPDES Permit Number 10555001, Effluent Limitations and Monitoring Requirements Number 1, Sludge Provisions and Biomonitoring Requirements 3.b., and Monitoring and Reporting Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limits for TSS and NH3N, by failing to timely submit the quarterly, semi-annual, and annual biomonitoring reports, and by failing to submit monitoring results for the pH daily maximum; PENALTY: $8,019; ENFORCEMENT COORDINATOR: Ruben Soto, (512) 239-4571; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(9) COMPANY: DDC Construction, Inc.; DOCKET NUMBER: 2006-0599-WQ-E; IDENTIFIER: RN104501788; LOCATION: Huntsville, Walker County, Texas; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §305.125(1), TPDES Construction General Permit Number TXR150000, Part III, Section F(2)(a) and (7), and the Code, §26.121(a), by failing to maintain sediment controls in an effective operating condition; and 30 TAC §205.6 and the Code, §5.702 and §26.0291(a), by failing to pay the general permits stormwater fee and associated late fees; PENALTY: $840; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(10) COMPANY: David W. Baker Homes, Inc.; DOCKET NUMBER: 2006-0650-DCL-E; IDENTIFIER: RN103954913 and RN103954335; LOCATION: Midland, Midland County, Texas; TYPE OF FACILITY: dry cleaning drop stations; RULE VIOLATED: 30 TAC §337.10(a) and THSC, §374.102(a), by failing to complete and submit the required registration form; PENALTY: $300; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(11) COMPANY: City of East Tawakoni; DOCKET NUMBER: 2005-0886-MWD-E; IDENTIFIER: RN101917847; LOCATION: East Tawakoni, Rains County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 11428001, Interim Effluent Limitations and Monitoring Requirements Numbers 1, 2, and 6, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for TSS, chlorine residual, and DO; PENALTY: $7,744; ENFORCEMENT COORDINATOR: Carolyn Lind, (903) 535-5100; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(12) COMPANY: FMC Technologies, Inc.; DOCKET NUMBER: 2006-0320-IWD-E; IDENTIFIER: RN100558022; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 02611, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for pH and chemical oxygen demand; PENALTY: $7,584; ENFORCEMENT COORDINATOR: Laurie Eaves, (512) 239-4495; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(13) COMPANY: Phillip P. Hamer; DOCKET NUMBER: 2006-0460-LII-E; IDENTIFIER: RN104105739; LOCATION: Cedar Park, Williamson County, Texas; TYPE OF FACILITY: irrigation and landscaping installation company; RULE VIOLATED: 30 TAC §344.94(b), by failing to include on all written contracts to install irrigation systems the statement: "Irrigation in Texas is regulated by the Texas Natural Resource Conservation Commission, P. O. Box 13087, Austin, Texas 78711-3087."; PENALTY: $420; ENFORCEMENT COORDINATOR: Libby Hogue, (512) 239-1165; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(14) COMPANY: Huntsman Petrochemical Corporation; DOCKET NUMBER: 2006-0399-AIR-E; IDENTIFIER: RN100219252; LOCATION: Port Neches, Jefferson County, Texas; TYPE OF FACILITY: petrochemical production; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), Permit Numbers 16909, Special Condition (SC) Number 1, 20485, SC 2D, Federal Operating Permit Number 1327, SC 15(A), and 5952A, SC 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions and by failing to meet the minimum net heating value requirements; and 30 TAC §101.201(a)(1)(B) and THSC, §382.085(b), by failing to properly notify the TCEQ of a reportable emissions event; PENALTY: $19,608; ENFORCEMENT COORDINATOR: John Barry, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(15) COMPANY: Clarence Jolly; DOCKET NUMBER: 2006-0900-WQ-E; IDENTIFIER: RN104955893; LOCATION: Crockett, Houston County, Texas; TYPE OF FACILITY: occupational licensing; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupation license; PENALTY: $210; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(16) COMPANY: KDGG Investments Partners, Ltd. dba LT Country Market; DOCKET NUMBER: 2006-0544-PST-E; IDENTIFIER: RN104694385; LOCATION: Austin, Travis County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs; and 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records; PENALTY: $4,000; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(17) COMPANY: Kingsville ISD; DOCKET NUMBER: 2006-0926-PST-E; IDENTIFIER: RN101873024; LOCATION: Kingsville, Kleberg County, Texas; TYPE OF FACILITY: school district with refueling facility; RULE VIOLATED: 30 TAC §334.50(d)(1)(B), by failing to implement inventory control methods; PENALTY: $1,750; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(18) COMPANY: City of Kyle and Aqua Operations, Inc.; DOCKET NUMBER: 2006-0417-MWD-E; IDENTIFIER: RN102182680; LOCATION: Kyle, Hays County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 11041002, Interim I Effluent Limitations and Monitoring Requirements Numbers 1 and 6, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for TSS, DO, and NH3N; PENALTY: $12,120; ENFORCEMENT COORDINATOR: Lynley Doyen, (512) 239-1364; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(19) COMPANY: Manual Garcia III dba Last Chance Drive In; DOCKET NUMBER: 2006-0927-PST-E; IDENTIFIER: RN102370806; LOCATION: Zapata, Zapata County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A), by failing to provide release detection; PENALTY: $1,750; ENFORCEMENT COORDINATOR:

Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(20) COMPANY: Darryl Wheeler dba Magnolia Lake RV Park ; DOCKET NUMBER: 2006-0389-PWS-E; IDENTIFIER: RN101237154; LOCATION: Goodrich, Polk County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(2)(A)(ii) and §290.122(c)(2)(A) and THSC, §341.033(d), by failing to conduct routine bacteriological monitoring and provide public notification; PENALTY: $2,923; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 490-3096; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(21) COMPANY: Robert C. Manning; DOCKET NUMBER: 2006-0928-PWS-E; IDENTIFIER: RN103628053; LOCATION: Evant, Coryell County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(22) COMPANY: NASIB, Inc. dba Discount Food Mart; DOCKET NUMBER: 2006-0192-PST-E; IDENTIFIER: RN101433167; LOCATION: Euless, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(c)(4) and the Code, §26.3475(d), by failing to have the cathodic protection system inspected and tested for operability and adequacy; 30 TAC §334.50(a)(1)(A), (b)(2), and (b)(2)(A)(i)(III) and the Code, §26.3475(a) and (c)(1), by failing to provide a release detection method capable of detecting a release from any portion of the UST system, by failing to provide release detection for the piping associated with the USTs, and by failing to test the line leak detectors; 30 TAC §115.248(1) and THSC, §382.085(b), by failing to make every current employee aware of the purposes and correct operating procedures of the Stage II vapor recovery system; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; and 30 TAC §115.242(3)(A) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system in proper operating condition; PENALTY: $6,080; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(23) COMPANY: National Oilwell Varco, L.P.; DOCKET NUMBER: 2006-0285-AIR-E; IDENTIFIER: RN100215268; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: pipe coating; RULE VIOLATED: 30 TAC §§106.261, 106.262, and 116.115(b)(2)(F), New Source Review Permit Number 7171, General Condition No. 8, and THSC, §382.085(b), by failing to comply with authorized emission limits; and 30 TAC §116.115(c) and THSC, §382.085(b), by failing to store all cleanup cloths, sponges, or other materials which have the potential to emit volatile organic compounds, in closed containers; PENALTY: $68,500; ENFORCEMENT COORDINATOR: Mac Vilas, (512) 239-2557; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(24) COMPANY: Rall Management, Inc. dba Sunmart 435; DOCKET NUMBER: 2006-0943-PST-E; IDENTIFIER: RN102060092; LOCATION: Conroe, Montgomery County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A), by failing to provide release detection; PENALTY: $1,750; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(25) COMPANY: City of Rhome; DOCKET NUMBER: 2005-0902-MWD-E; IDENTIFIER: RN102701620; LOCATION: Rhome, Wise County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and (17), TPDES Permit Number 10701002, Final Effluent Limitations and Monitoring Requirements Numbers 1 and 2 and Sludge Provisions, and the Code, §26.121(a), by failing to comply with permitted effluent limits for CBOD5 and chlorine and by failing to submit the annual sludge report; PENALTY: $29,165; ENFORCEMENT COORDINATOR: Laurie Eaves, (512) 239-4495; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(26) COMPANY: City of Rosenberg; DOCKET NUMBER: 2006-0436-MWD-E; IDENTIFIER: RN103134110; LOCATION: Rosenberg, Fort Bend County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and (9)(A) and §319.7(d) and TPDES Permit Number WQ0010607004, Other Requirements Number 7, Monitoring and Reporting Requirements Number 1 and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to notify the TCEQ of the completion and activation of the facility, by failing to submit the discharge monitoring reports for February 2004 through December 2005, by failing to maintain compliance with the permit effluent limits, by failing to maintain compliance with the TSS limitations, and by failing to submit noncompliance notification reports for the TSS violations; PENALTY: $12,750; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(27) COMPANY: Ruben D. Serna; DOCKET NUMBER: 2006-0895-MSW-E; IDENTIFIER: RN104960182; LOCATION: Hebbronville, Jim Hogg County, Texas; TYPE OF FACILITY: municipal solid waste; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(28) COMPANY: Texas Instruments Incorporated; DOCKET NUMBER: 2006-0430-IWD-E; IDENTIFIER: RN101717999; LOCATION: Stafford, Fort Bend County, Texas; TYPE OF FACILITY: manufacturing facility for semiconductor and related devices; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 01225, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, and the Code, §26.121(a), by failing to comply with the permitted effluent limits for chemical oxygen demand, oil and grease, pH, and NH3N; PENALTY: $19,040; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(29) COMPANY: Three Rivers Flying Service Co., Inc.; DOCKET NUMBER: 2006-0538-PST-E; IDENTIFIER: RN100672690; LOCATION: San Angelo, Tom Green County, Texas; TYPE OF FACILITY: flying service; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; and 30 TAC §334.51(b)(2)(B) and the Code, §26.3475(c)(2), by failing to equip the UST fill tube with a spill container or catchment basin; PENALTY: $1,200; ENFORCEMENT COORDINATOR: Christina Martinez, (512) 239-0739; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(30) COMPANY: Timpson Independent School District; DOCKET NUMBER: 2005-0778-PST-E; IDENTIFIER: Petroleum Storage Tank Facility Identification Number 31443, RN101759199; LOCATION: Timpson, Shelby County, Texas; TYPE OF FACILITY: fuel tanks for school district vehicles; RULE VIOLATED: 30 TAC §334.8(c)(5)(A)(i) and (B) and the Code, §26.3467(a), by failing to possess a valid delivery certificate and by failing to submit timely and complete UST registration and self-certification renewal forms; and

30 TAC §334.50(a)(1)(A) and the Code, §26.3475(c)(1), by failing to provide a release detection method for the UST system; PENALTY: $5,100; ENFORCEMENT COORDINATOR: John Barry, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(31) COMPANY: T.O.P. Ministries, Inc.; DOCKET NUMBER: 2006-0412-PWS-E; IDENTIFIER: RN101273746; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: church with public water supply; RULE VIOLATED: 30 TAC §290.109(c)(2)(F), (c)(3)(A)(ii) and (f)(3), §290.122(b)(2)(B) and (c)(2)(B), and THSC, §341.031(a) and §341.033(d), by failing to collect at least five routine samples following a total coliform positive result, by failing to submit routine bacteriological samples, by failing to collect four repeat samples for each total coliform positive sample found, by failing to provide public notice of failure to collect repeat samples, and by exceeding the maximum contaminant level for total coliform; PENALTY: $2,188; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(32) COMPANY: Vanity Homes, LLC; DOCKET NUMBER: 2006-0413-WQ-E; IDENTIFIER: RN104915236; LOCATION: Houston, Montgomery County, Texas; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(c), by failing to obtain authorization to discharge storm water associated with construction activities; PENALTY: $2,160; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-200603789

Stephanie Bergeron Perdue

Deputy Director, Office of Legal Services

Texas Commission on Environmental Quality

Filed: July 18, 2006

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Correction of Error

The Texas Commission on Environmental Quality adopted 30 TAC §111.203 and §111.209, concerning outdoor burning. The notice of adoption appeared in the July 14, 2006, issue of the *Texas Register* (31 TexReg 5654).

In the preamble on page 5655, the first paragraph under *Background* contained typographical errors. The sentence should read as follows.

"In September 1996 (21 TexReg 8505), the commission approved revisions to the Texas outdoor burning regulations by repealing §§111.101, 111.103, 111.105, and 111.107 and adopting §§111.201, 111.203, 111.205, 111.207, 111.209, 111.211, 111.213, 111.215, 111.219, and 111.221."

TRD-200603822

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Notice of District Petition

Notices mailed July 18, 2006

TCEQ Internal Control No. 05232006-D01; Bright Star-Salem Water Supply Corporation (Petitioner) has filed a petition with the Texas Commission on Environmental Quality (TCEQ) to convert Bright Star-Salem Water Supply Corporation to Bright Star-Salem Special Utility District (District) and to transfer Certificate of Convenience and Necessity (CCN) No. 10404 from Bright Star-Salem Water Supply Corporation to Bright Star-Salem Special Utility District. Bright Star-Salem Special Utility District's business address will be: 238 N. Osborn St; Alba, Texas 75410. The petition was filed pursuant to Chapters 13 and 65 of the Texas Water Code; 30 Texas Administrative Code Chapters 291 and 293; and the procedural rules of the TCEQ. The proposed District is located in Wood and Rains Counties and will contain approximately 62.57 square miles. The territory to be included within the proposed District includes all of the singularly certified service area covered by CCN No. 10404. CCN No. 10404 will be transferred after a positive confirmation election.

TCEQ Internal Control No. 07032006-D04; 2004 Mustang Creek, Ltd. (Petitioner) filed a petition for creation of Brazoria County Municipal Utility District No. 39 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioner is the owner of a majority in value of the land to be included in the proposed District; (2) there is one lienholder, Wachovia Bank, N.A, on the property to be included in the proposed District, and the Petitioner has provided the TCEQ with a certificate evidencing its consent to the creation of the proposed District; (3) the proposed District will contain approximately 513.95 acres located within Brazoria County, Texas; and (4) the proposed District is within the extraterritorial jurisdiction of the City of Manvel, Texas, and no portion of land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas. By Resolution No. 2006-R-05, effective May 8, 2006, the City of Manvel, Texas, gave its consent to the creation of the proposed District. According to the petition, the Petitioner has conducted a preliminary investigation to determine the cost of the project and from the information available at the time, the cost of the project is estimated to be approximately $34,500,000.

TCEQ Internal Control No. 07032006-D03; 2004 Mustang Creek, Ltd. (Petitioner) filed a petition for creation of Brazoria County Municipal Utility District No. 40 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioner is the owner of a majority in value of the land to be included in the proposed District; (2) there is one lienholder, Wachovia Bank, N.A, on the property to be included in the proposed District, and the Petitioner has provided the TCEQ with a certificate evidencing its consent to the creation of the proposed District; (3) the proposed District will contain approximately 454.45 acres located within Brazoria County, Texas; and (4) the proposed District is within the extraterritorial jurisdiction of the City of Manvel, Texas, and no portion of land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas. By Resolution No. 2006-R-06, effective May 8, 2006, the City of Manvel, Texas, gave its consent to the creation of the proposed District. According to the petition, the Petitioner has conducted a preliminary investigation to determine the cost of the project and from the information available at the time, the cost of the project is estimated to be approximately $23,000,000.

INFORMATION SECTION

To view the complete issued notices, view the notices on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on a petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed district's boundaries. You may also submit your proposed adjustments to the petition. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below.

The Executive Director may approve a petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of the notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court.

Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team at 1-512-239-4691. Si desea información en Español, puede llamar al 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200603805
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: July 19, 2006

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **August 28, 2006**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on August 28, 2006**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, comments on the DOs shall be submitted to the commission in **writing**.

(1) COMPANY: Deer Park Business, Inc. dba Fuel Expo; DOCKET NUMBER: 2004-0423-PST-E; TCEQ ID NUMBERS: 35149 and RN102369162; LOCATION: 101 West San Augustine Street, Deer Park, Harris County, Texas; TYPE OF FACILITY: underground storage tank (UST); RULES VIOLATED: 30 TAC §334.8(c)(5)(A)(i) and Texas Water Code (TWC), §26.3467(a), by failing to make available to a common carrier a valid, current delivery certificate for the UST before accepting delivery of a regulated substance; 30 TAC §334.8(c)(3) and (4), by failing to timely submit to the agency a UST registration and self-certification form, that is accurate and complete; 30 TAC §334.7(a), (c), and (e), by failing to register the new or replacement UST within 30 days after the date a regulated substance is placed into the tank; 30 TAC §334.6(b)(2)(A), by failing to file a written notification form with the TCEQ at least 30 days prior to initiating a major UST construction activity; 30 TAC §334.10(b), by failing to develop and maintain all required UST records at the facility; 30 TAC §334.51(b)(2)(C), by failing to equip tank 2B (containing diesel fuel) with overfill prevention equipment; PENALTY: $6,300; STAFF ATTORNEY: Rebecca Davis, Litigation Division, MC 175, (512) 239-5487; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: ECO Himal Incorporated dba Denton Food Mart; DOCKET NUMBER: 2005- 1832-PST-E; TCEQ ID NUMBER: RN101447076; LOCATION: 4101 Denton Highway, Haltom City, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.51(b)(2)(C) and TWC, §26.3475(c)(2), by failing to equip each UST with a valve or other device designed to automatically shut off the flow of regulated substances into the tank when the liquid level in the tank reaches a preset level no higher than the 95% capacity level for the tank; 30 TAC §334.50(b)(1)(A), (b)(2)(A)(i)(III), and (d)(1)(B)(ii) and TWC, §26.3475(a) and (c)(1), by failing to monitor the USTs for releases at a frequency of at least once per month, by failing to test the line leak detector at least once per year for performance and operational reliability and by failing to conduct reconciliation of detailed inventory control records at least once a month, sufficiently accurate to detect a release as small as the sum of 1.0% of the total substance flow through for the month plus 130 gallons; PENALTY: $3,570; STAFF ATTORNEY: Robert Mosley, Litigation Division, MC 175, (512) 239-0627; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Fuller Oil Co., Inc. dba Country Corner; DOCKET NUMBER: 2005-0581-PST-E; TCEQ ID NUMBERS: RN102441706; LOCATION: Intersection of Highway 146 and Highway 787, Rye, Liberty County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; 30 TAC §334.22(a) and §334.128(a)

and TWC, §5.702, by failing to pay outstanding fees; PENALTY: $3,150; STAFF ATTORNEY: Rebecca Davis, Litigation Division, MC 175, (512) 239-5487; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023- 1486, (713) 767-3500.

(4) COMPANY: Gita K. Samadi dba Joe's Country Store; DOCKET NUMBER: 2005-0825-PST-E; TCEQ ID NUMBER: RN101549178; LOCATION: 7616 North Main Street, The Colony, Denton County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to provide acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; PENALTY: $3,210; STAFF ATTORNEY: Rebecca Davis, Litigation Division, MC 175, (512) 239-5487; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: Guru Rakha, Inc. dba Speedy Mart; DOCKET NUMBER: 2005-0118-PST-E; TCEQ ID NUMBERS: 35292 and RN101835825; LOCATION: 2050 Bingle Road, Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to provide acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; PENALTY: $3,150; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767- 3500.

(6) COMPANY: Joe Smith; DOCKET NUMBER: 2005-0699-WQ-E; TCEQ ID NUMBER: RN104459383; LOCATION: 3900 United States Highway 190 West, Livingston, Polk County, Texas; TYPE OF FACILITY: sand mining operation; RULES VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations §122.26(a), by failing to obtain commission authorization to discharge storm water associated with industrial activity into water in the state through an individual permit or the Multi-Sector General Permit TXR050000; TWC, §26.121(a), by failing to prevent the unauthorized discharge of sediment from the facility; PENALTY: $6,000; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(7) COMPANY: Jose Hurtado and Maria Franco; DOCKET NUMBER: 2005-1999-OSS-E; TCEQ ID NUMBER: RN103003257; LOCATION: 868 East Laramie Lane, Dallas, Dallas County, Texas; TYPE OF FACILITY: on-site sewage facility (OSSF); RULES VIOLATED: 30 TAC §285.1(a) and TWC, §26.121(a), by failing to prevent the unauthorized discharge of wastewater from a failing OSSF; PENALTY: $263; STAFF ATTORNEY: Robert Mosley, Litigation Division, MC 175, (512) 239-0627; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(8) COMPANY: Ricardo Ortega dba Ortega's Trees and Landscaping; DOCKET NUMBER: 2003- 0543-LII-E; TCEQ ID NUMBERS: 8904-1033-J and RN103126249; LOCATION: 509 West Interstate Highway 10, Sequin, Guadalupe County, Texas; TYPE OF FACILITY: landscape irrigation system; RULES VIOLATED: 30 TAC §30.5(a) and (b) and §344.4(a); Texas Occupations Code, §1903.251; and TWC, §37.003, by failing to obtain a license issued by the commission to sell or install an irrigation system at the site on or before December 3, 2001; PENALTY: $250; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

TRD-200603786
Mary Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: July 18, 2006

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **August 28, 2006**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on August 28, 2006**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing**.

(1) COMPANY: Belvan Corp.; DOCKET NUMBER: 2002-0898-AIR-E; TCEQ ID NUMBERS: CZ0000-F and RN100214022; LOCATION: six miles east of the intersection of State Highway 137 and United States Highway 190 near Ozona, Crockett County, Texas; TYPE OF FACILITY: natural gas processing plant; RULES VIOLATED: 30 TAC §122.145(2)(A) and Texas Health and Safety Code (THSC), §382.085(b), by failing to submit a complete and accurate deviation report by January 1, 2002; 30 TAC §101.20(1); General Operating Permit No. 514, Special Condition No. (c)(11); 40 Code of Federal Regulations (CFR) §60.632(a); and THSC, §382.085(b), by failing to conduct the fugitive emissions leak detection and repair program in accordance with New Source Performance Standard, Subpart KKK; 30 TAC §116.115(c) and §101.20(1); General Operating Permit No. 514, Condition (c)(13); TCEQ Permit No. 9824A, Special Condition (SC) No. 7; 40 CFR §60.642(b) and THSC, §382.085(b), by failing to comply with the required minimum sulfur dioxide emission reduction efficiency; 30 TAC §106.512(2)(C)(iii); General Operating Permit No. 514, Condition (b)(4)(A); and THSC, §382.085(b), by failing to conduct an initial performance test within 60 days of the initial start-up of an engine; 30 TAC §111.111(a)(4)(A)(ii); General

Operating Permit No. 514, Condition (c)(4); and THSC, §382.085(b), by failing to maintain a daily flare operation log that denotes when the process flare was observed and whether or not it was smoking; 30 TAC §116.115(b)(2)(H); General Operating Permit No. 514, Condition (b)(4)(A); and THSC, §382.085(b), by failing to maintain all air pollution emission capture and abatement equipment in good working order; 30 TAC §122.145(2)(A) and (C); General Operating Permit No. 514, Condition (b)(2); and THSC, §382.085(b), by failing to report all instances of deviations for the periods of December 3, 2001 - June 2, 2002; June 3 - December 2, 2002; and December 3, 2002 - June 2, 2003; 30 TAC §122.146(2); General Operating Permit No. 514, Condition (b)(2); and THSC, §382.085(b), by failing to submit a compliance certification report within 30 days after the certification period; 30 TAC §122.503(a)(1) and (c)(2); General Operating Permit No. 514, Condition (b)(1); and THSC, §382.085(b), by failing to submit a revised general operating permit application prior to the operation of a change in applicability determinations at a site; PENALTY: $48,900; STAFF ATTORNEY: Alfred Okpohworho, Litigation Division, MC R-12, (713) 422-8918; REGIONAL OFFICE: San Angelo Regional Office, 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(2) COMPANY: Chong Bai Xia dba Twin Lakes Water Co.; DOCKET NUMBER: 2005-0732-PWS-E; TCEQ ID NUMBER: RN101453512; LOCATION: 6495 Appian Way, Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.109(c)(2)(A)(ii) and (g)(4), §290.122(c)(2)(A) and THSC, §341.033(d), by failing to collect and submit monthly routine water samples and by failing to post public notice related to the failure to sample; 30 TAC §290.109(c)(3)(A)(ii), (c)(2)(F), and (g)(4) and §290.122(c)(2)(A), by failing to collect and submit repeat samples following a coliform positive result and the required number of additional samples following a month in which a coliform-positive sample was obtained and by failing to post public notice related to the failure to sample; 30 TAC §290.109(f)(3) and (g)(4), §290.122(b)(2)(A) and THSC, §341.031(a), by exceeding a maximum contaminant level (MCL) in June 2004, and by failing to post notice for exceeding an MCL; PENALTY: $1,220; STAFF ATTORNEY: Kari Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Diana Shane dba Town & Country Grocery; DOCKET NUMBER: 2005-0186-PST-E; TCEQ ID NUMBER: RN102058831; LOCATION: 1506 North Johnson Street, Greenville, Hunt County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to provide acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases from the operation of petroleum underground storage tanks (USTs); PENALTY: $760; STAFF ATTORNEY: Deanna Sigman, Litigation Division, MC 175, (512) 239-0619; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: Haafiz & Aman, Inc.; DOCKET NUMBER: 2003-1195-PST-E; TCEQ ID NUMBER: RN101794758; LOCATION: 3110 16th Street, Orange County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and Texas Water Code (TWC), §26.3475(c)(1), by failing to monitor for releases from the USTs once per month, not to exceed 35 days; PENALTY: $1,300; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(5) COMPANY: Maks Corporation, Inc. dba Quick & Easy 2; DOCKET NUMBER: 2005-0142-PST-E; TCEQ ID NUMBERS: RN101810687; LOCATION: 4014 Highway 59 Loop North, Wharton, Wharton County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; 30 TAC §334.22(a) and TWC, §5.702, by failing to pay UST fees and associated late fees for TCEQ Account Number 000054134U for Fiscal Year 2005; PENALTY: $5,360; STAFF ATTORNEY: Kathleen Decker, Litigation Division, MC 175, (512) 239-6500; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(6) COMPANY: Michael Sargeant dba Sargeant's Wholesale Biologicals; DOCKET NUMBER: 2005-0556-AIR-E; TCEQ ID NUMBER: RN103179925; LOCATION: 29155 Noll Road, Boerne, Bexar County, Texas; TYPE OF FACILITY: animal embalming plant; RULES VIOLATED: 30 TAC §116.110(a)(1) and (4), and THSC, §382.085(b) and §382.0518(a), by failing to obtain a New Source Review (NSR) permit prior to operating the plant; and 30 TAC §101.4, and THSC, §382.085(b), by failing to prevent a discharge of one or more air contaminants in such concentration and of such duration that the contaminants interfere with the normal use and enjoyment of animal life, vegetation, or property; PENALTY: $6,630; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(7) COMPANY: Moghul Empire Inc. dba Kolkhorst - Ali 12; DOCKET NUMBER: 2005-0891-PST-E; TCEQ ID NUMBER: RN102044096; LOCATION: 3324 Robinson Drive, Waco, McLennan County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.10(b), by failing to have required UST records maintained and readily accessible for inspection upon request by a representative of the TCEQ; 30 TAC §334.7(d)(3), by failing to amend the registration within 30 days of any change to reflect the current status of the UST system; 30 TAC §334.8(c)(5)(C), by failing to label the USTs according to the registration and self-certification form; 30 TAC §334.49(c)(2)(C) and (c)(4) and TWC, §26.3475(d), by failing to inspect the cathodic protection system at least once every 60 days and to test the system at least once every three years for proper operability; 30 TAC §334.50(b)(1)(A) and (b)(2)(A)(i)(III) and TWC, §26.3475(a) and (c)(1), by failing to monitor the USTs for releases at a frequency of at least once every month and to have the line leak detectors tested at least once per year for performance and operational reliability; PENALTY: $7,455; STAFF ATTORNEY: Rebecca Davis, Litigation Division, MC 175, (512) 239-5487; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(8) COMPANY: Redford Water Supply; DOCKET NUMBER: 2005-1074-PWS-E; TCEQ ID NUMBERS: 1890012 and RN101266054; LOCATION: State Highway 170, 16 miles east of Presidio, Presidio County, Texas; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and THSC, §341.033(d), by failing to collect and submit monthly water samples for bacteriological analysis for the months of February, March, and July 2003, and December 2004 and January 2005; PENALTY: $1,600; STAFF ATTORNEY: Rebecca Davis, Litigation Division, MC 175, (512) 239-5487; REGIONAL OFFICE: El Paso Regional Office, 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(9) COMPANY: Sabina Petrochemicals LLC; DOCKET NUMBER: 2005-0456-AIR-E; TCEQ ID NUMBER: RN100216977; LOCATION: 2700 Highway 366, Port Arthur, Jefferson County, Texas; TYPE OF FACILITY: petrochemical manufacturing plant; RULES VIOLATED: 30 TAC §101.20(3), and §116.115(b)(2)(F) and (c); Permit No. 41945/ PSD-TX-950/N 018; and THSC, §382.085(b), by failing to maintain a volatile organic compounds (VOC) emission rate below the allowable limit for the High Pressure Flare (emission point number (EPN) P-7, Incident No. 38454); 30 TAC §101.20(3), and §116.115(b)(2)(F) and (c); Permit No. 41945/ PSD-TX-950/N-018, SC No. 1; and THSC, §382.085(b), by failing to maintain a VOC emission rate below the allowable emission limit for the Low Pressure Flare (EPN P-6, Incident No. 39496); 30 TAC §101.20(3) and §116.115(b)(2)(F) and (c); Permit No. 41945/PSD-TX-950/N-018, SC No. 1; and THSC, §382.085(b), by failing to maintain an emission rate below the allowable emission limits for the Low Pressure Flare (EPN P-6, Incident No. 39497); 30 TAC §101.20(3) and §116.115(b)(2)(F) and (c); Permit No. 41945/PSD-TX-950/N-018, SC No. 1; and THSC, §382.085(b), by failing to maintain an emission rate below the allowable emission limits from the Flow Valve at the Crude C4 Line in the C4 Complex (Incident 47680); 30 TAC §101.20(3) and §116.115(b)(2)(F) and (c); Permit No. 41945/PSD-TX-950/N-018, SC No.1; and THSC, §382.085(b), by failing to maintain an emission rate below the allowable emission limits from the High Pressure Flare (EPN P-7, Incident 38856); 30 TAC §101.20(3) and §116.115(b)(2)(F) and (c); Permit No. 41945/PSD-TX-950/N-018, SC No. 1; and THSC, §382.085(b), by failing to maintain an emission rate below the allowable emission limits from the High Pressure Flare (EPN P-7, Incident 38862); 30 TAC §101.20(3) and §116.115(b)(2)(F) and (c); Permit No. 41945/PSD-TX-950/N-018, SC No. 1; and THSC, §382.085(b), by failing to maintain an emission rate below the allowable emission limits from the Low Pressure Flare (EPN P-6, Incident 38857); 30 TAC §101.20(3) and §116.115(b)(2)(F) and (c); Permit No. 41945/PSD-TX-950/N-018, SC No. 1; and THSC, §382.085(b), by failing to maintain an emission rate below the allowable emission limits from the Low Pressure Flare (EPN P-6, Incident 38858); 30 TAC §101.20(3) and §116.115(b)(2)(F) and (c); Permit No. 41945/PSD-TX-950/N-018, SC No. 1; and THSC, §382.085(b), by failing to maintain an emission rate below the allowable emission limits from the Low Pressure Flare (EPN P-6, Incident 38860); 30 TAC §101.20(3) and §116.115(b)(2)(F) and (c); Permit No. 41945/PSD-TX-950/N-018, SC No. 1; and THSC, §382.085(b), by failing to maintain an emission rate below the allowable emission limits from the Low Pressure Flare (EPN P-6, Incident 38861); 30 TAC §101.20(3) and §116.115(b)(2)(F) and (c); Permit No. 41945/PSD-TX-950/N-018, SC No. 1, and THSC, §382.085(b), by failing to maintain an emission rate below the allowable emission limits from the Low Pressure Flare (EPN P-6, Incident 43641); 30 TAC §101.20(3) and §116.115(b)(2)(F) and (c); Permit No. 41945/PSD-TX-950/N-018, SC No. 1; and THSC, §382.085(b), by failing to maintain an emission rate below the allowable emission limits from the Low Pressure Flare (EPN P-6, Incident 43644); 30 TAC §101.20(3) and §116.115(b)(2)(F) and (c); Permit No. 41945/PSD-TX-950/N-018, SC No. 1; and THSC, §382.085(b), by failing to maintain an emission rate below the allowable emission limits from the Low Pressure Flare (EPN P-6, Incident 43650); 30 TAC §101.20(3) and §116.115(b)(2)(F) and (c); Permit No. 41945/PSD-TX-950/N-018, SC No. 1; and THSC, §382.085(b), by failing to maintain an emission rate below the allowable emission limits from the High Pressure Flare (EPN P-7, Incident 56391); 30 TAC §101.20(3) and §116.115(b)(2)(F) and (c); Permit No. 41945/PSD-TX-950/N-018, SC No. 1; and THSC, §382.085(b), by failing to maintain an emission rate below the allowable emission limits from the High Pressure Flare (EPN P-7, Incident 56392); PENALTY: $33,275; STAFF ATTORNEY: Kathleen Decker, Litigation Division, MC 175, (512) 239-6500; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(10) COMPANY: Sam Lakhani dba SLR Grocery; DOCKET NUMBER: 2004-0806-PST-E; TCEQ ID NUMBER: RN101697639; LOCATION: 6004 Lohmans Ford Road, Lago Vista, Travis County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.49(c)(2)(C) and (c)(4)(C), by failing to inspect and test the corrosion protection equipment and by failing to ensure that the rectifier and other system components are operating properly; PENALTY: $2,550; STAFF ATTORNEY: Amie Richardson, Litigation Division, MC 175, (512) 239-2999; REGIONAL OFFICE: Austin Regional Office, 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(11) COMPANY: Sultana Interstate Inc. dba Handi Stop 50; DOCKET NUMBER: 2005-1558-PST-E; TCEQ ID NUMBER: RN101749554; LOCATION: 2230 Wirt Road, Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of its petroleum USTs; PENALTY: $3,210; STAFF ATTORNEY: Kari Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(12) COMPANY: Union Oil Company of California dba Unocal Beaumont Terminal; DOCKET NUMBER: 2004-1640-AIR-E; TCEQ ID NUMBERS: RN102596210; LOCATION: the intersection of Highway 366 at Highway 347, Nederland, Jefferson County, Texas; TYPE OF FACILITY: petroleum storage plant; RULES VIOLATED: 30 TAC §116.115(c) and § 122.143(4); Air Permit No. 6312, SC 7H; Federal Operating Permit (FOP) No. 1025, SC 14; and THSC, §382.085(b), by failing to maintain valves at the marine loading dock in a condition to prevent VOC emissions; 30 TAC §115.212(a)(3)(A)(i) and (a)(3)(B), and §122.143(4); FOP No. 1025, SC 5(A)(i) and (ii); and THSC, §382.085(b), by failing to equip liquid lines used for land-based VOC transfers with fittings that make vapor-tight connections to prevent VOC emissions. Additionally, two not-in-use loading hoses (Tank 254 Unload and Tank 256 Unload) located at the truck loading rack ("Emission Point TRE01") were leaking VOC from their hose ends; 30 TAC §115.212(a)(3)(A)(ii) and §122.143(4); FOP No. 1025, SC 5(A)(iii); and THSC, §382.085(b), by failing to close and to make vapor-tight a portable container used to empty liquid VOC lines; 30 TAC §115.412(1)(A), (1)(C), and (1)(F); and THSC, §382.085(b), by failing to operate a cold solvent cleaner/degreaser in accordance with applicable requirements; 30 TAC §115.132(a)(2) and §122.143(4); FOP No. 1025, SC 1(A); and THSC, §382.085(b), by failing to seal the water separation unit compartment to totally enclose the liquid contents and of all openings so that the separator can hold a vacuum or pressure without emissions to the atmosphere; 30 TAC §111.111(a)(4)(A)(ii) and §122.143(4); FOP No. 1025, SC 1(A); and THSC, §382.085(b), by failing to record daily flare observations between August 10, 2003 - February 9, 2004; 30 TAC §116.115(c) and §122.143(4); Air Permit No. 6559, SC 1; FOP No. 1025, SC 14; and THSC, §382.085(b), by failing to notify the TCEQ in writing prior to conducting cavern fillings/withdrawals with strategic petroleum reserve crude oil on nine occasions between October 11, 2003 - February 10, 2004; 30 TAC §101.20(1); 40 CFR §60.112b(a)(2)(iii); FOP No. 1025, SC 1(A); and THSC, §382.085(b), by failing to empty and refill a storage tank (constructed or modified after July 23, 1984) as rapidly as possible when the external floating roof is resting

on the leg support; 30 TAC §101.20(1) and §122.143(4); 40 CFR §60.112a(a)(1); FOP No. 1025, SC 1(A); and THSC, §382.085(b), by failing to empty and refill a storage tank (constructed or modified after May 18, 1978 - July 23, 1984) as rapidly as possible when the external floating roof is resting on the leg support; 30 TAC §§113.300, 116.115(b)(2)(F), and 122.143(4); 40 CFR §63.562(b)(2); FOP No. 1025, SCs 1(A); and THSC, §382.085(b), by failing to utilize a vapor recovery system to capture VOC emissions resulting from marine loading operations to reduce emissions by 97 weight-percent as required; 30 TAC §116.115(b)(2)(F) and §122.143(4); TCEQ Air Permit No. 6312, Maximum Allowable Emission Rate Table (MAERT), FOP No. 1025, SC 14; and THSC, §382.085(b), by failing to comply with conditions contained in the permit MAERT during operations; 30 TAC §113.300 and §122.143(4); 40 CFR §63.563(c)(1); FOP No. 1025, SC 1(A); and THSC, §382.085(b), by failing to inspect and monitor all ductwork, piping, and connections to a vapor collection system and control devices once each calendar year; 30 TAC §116.115(c) and §122.143(4); TCEQ Air Permit No. 6312, SC 9H; FOP No. 1025, SC 14; and THSC, §382.085(b), by failing to repair or replace one component found to be leaking fugitive emissions in excess of 500 parts per million by volume (ppmv) within 15 days as required by the NSR Permit; 30 TAC §116.115(c) and §122.143(4); TCEQ Air Permit No. 6559, SC 15H; FOP No. 1025, SC 14; and THSC, §382.085(b), by failing to repair or replace a component of Tank 122 found to be leaking fugitive emissions in excess of 500 ppmv within 15 days as required during 2003 - 2004; 30 TAC §122.121; FOP No. 1025, SC 14; and THSC, §382.085(b), by failing to include the cold solvent cleaner/degreaser in the FOP No. 1025; 30 TAC §122.143(4) and §122.145(2)(A) and (2)(C), FOP No. 1025, General Terms and Conditions (GT and C), and THSC, §382.085(b), by failing to submit a deviation report no later than 30 days after the end of each reporting period; 30 TAC §101.20(1) and §122.143(4), 40 CFR §60.112b(a)(2)(iii), FOP No. 1025, Special Terms and Conditions No. 1.A., and THSC, §382.085(b), by failing to be continuous (defined as less than or equal to 24 hours) in accomplishing the process of filling, emptying, and refilling a storage tank equipped with an external floating roof (constructed or modified after July 23, 1984) as rapidly as possible; 30 TAC §116.115(c) and §122.143(4), TCEQ Permit No. 56419, SC 3, FOP No. 01025, GT & C, ST & C No. 14, and THSC, §382.085(b), by failing to abide by the Maximum Allowable Annual Loading Volume for marine loading as permitted; PENALTY: $79,820; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(13) COMPANY: W&W Fiberglass Tank Company; DOCKET NUMBER: 2004-1427-AIR-E; TCEQ ID NUMBER: RN102004314; LOCATION: 207 South Price Road, Pampa, Gray County, Texas; TYPE OF FACILITY: fiberglass tank manufacturing plant; RULES VIOLATED: 30 TAC §116.115(c); TCEQ Permit No. 47294; and THSC, §382.085(b), by failing to equip the exhaust stack with filters that achieve an arrestance of at least 95% for all particle sizes; 30 TAC §122.145(2)(C), and §122.146(2) and THSC, §382.085(b), by failing to submit deviation reports no later than 30 days after the end of reporting period; and THSC, §370.008 and TWC, §5.702, by failing to pay past due Toxic Chemical Release fees; PENALTY: $12,495; STAFF ATTORNEY: Shannon Strong, Litigation Division, MC 175, (512) 239-0972; REGIONAL OFFICE: Amarillo Regional Office, 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

TRD-200603785

Mary Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: July 18, 2006

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Notice of Water Quality Applications

The following notices were issued during the period of June 29, 2006 through July 13, 2006.

The following require the applicants to publish notice in the newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

AQUA DEVELOPMENT, INC. has applied for a renewal of TPDES Permit No. 14143-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 450,000 gallons per day. The facility will be located approximately 2 miles west of the City of Justin on Farm-to-Market Road 407 in Denton County, Texas.

ARKEMA INC. which operates a mercaptans and sulfides manufacturing plant, has applied for a major amendment to TPDES Permit No. WQ0001872000 to authorize the discharge of raw water and filtered water via Outfall 201 and to remove Outfall 101 (and associated regulatory requirements) from the permit. The current permit authorizes the discharge of untreated storm water runoff, storm water from the process area (Sulfox) and previously monitored effluents (process wastewater, boiler blowdown, regenerate water, domestic wastewater, and treated storm water runoff from internal Outfall 101 and utility wastewater generated by the reverse osmosis (RO) system and non-contact cooling tower blowdown from internal Outfall 201) on an intermittent and flow variable basis via Outfall 001. The facility is located approximately 2.5 miles east of the intersection of U.S. Highway 90 and State Highway 380, between the Mobil Oil Refinery and P D Glycol, near the City of Beaumont, Jefferson County, Texas.

CREEK PARK CORPORATION has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. 13868-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 22,500 gallons per day. TCEQ received this application on March 03, 2006. The facility is located approximately 1 mile east of County Road and approximately 1.5 miles south of the intersection of County Road 600 and Farm-to-Market 917 in Johnson County, Texas.

DEL GRANDE MOBILE HOME OWNERS' ASSOCIATION, INC. has applied to the Texas Commission on Environmental Quality (TCEQ) for a new permit, Proposed Permit No. WQ0014605001, to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 18,000 gallons per day via surface irrigation of 9.5 acres of non-public access pasture land. The facility and disposal site are located 0.2 mile south of U.S. Highway 90 and 0.3 mile west of Bayview Road in Val Verde County, Texas. The facility and disposal site are located in the drainage basin of Eightmile Creek in Segment No. 2304 of the Rio Grande Basin.

CITY OF ENNIS has applied for a renewal of TPDES Permit No. 10443-002, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 3,100,000 gallons per day. The facility is located approximately 1.5 miles south of the intersection of State Highway 34 and Farm-to-Market Road 1183, and approximately 2.5 miles south of the intersection of Interstate Highway 45 and State Highway 34 in Ellis County, Texas.

HEAD FAMILY PARTNERSHIP, LTD, which operates National Truck Stop, a truck stop consisting of a restaurant, showers, and restrooms, has applied for a renewal of TPDES Permit No. WQ0003068000, which authorizes the discharge of treated domestic wastewater and truck wash wastewater at a daily average flow not to exceed 20, 000 gallons per day via Outfall 001. The facility is located on the south side of the intersection of Interstate Highway 20 and Farm-to-market Road 968 approximately 1500 feet east of Loop 281, Harrison County, Texas.

SOUTHWEST FESTIVALS, INC. AND RICHARD KORSH have applied to the Texas Commission on Environmental Quality (TCEQ) for a new permit, Proposed Permit No. WQ0014665001, to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 17,700 gallons per day during seasonal operation via surface irrigation of two acres of non-public access land. The permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located on Farm-to-Market Road 66, approximately 1.6 miles southwest of Interstate Highway 35 East in Ellis County, Texas. The facility and disposal site are located in the drainage basin of South Prong Creek in Segment No. 0816 of the Trinity River Basin.

U.S. ARMY CORPS OF ENGINEERS has applied for a renewal of TPDES Permit No. 12052-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 18,000 gallons per day. The facility is located in East Fork Park, on the south side of Lavon Lake, at a point approximately 2 miles northeast of the intersection of State Highway 78 and Farm-to-Market Road 544 in Collin County, Texas.

U.S. ARMY CORPS OF ENGINEERS has applied for a renewal of TPDES Permit No. 12055-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 18,000 gallons per day. The facility is located in Avalon Park, on the south side of Lavon Lake, immediately northwest of Lavon Dam, and approximately 2.5 miles northwest of the intersection of State Highway 78 and State Highway 205 in Collin County, Texas.

Written comments or requests for a public meeting may be submitted to the Office of the Chief Clerk, at the address provided in the information section above, WITHIN 30 DAYS OF THE ISSUED DATE OF THE NOTICE.

THE CITY OF BASTROP has applied for a minor amendment to TPDES Permit No. WQ0011076002 to reduce the authorized discharge of treated domestic wastewater to an annual average flow not to exceed 4,000,000 gallons per day. The existing permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 5,000,000 gallons per day. The facility will be located approximately 1.5 miles south of the intersection of State Highway 71 and State Highway 304, on the north bank of the confluence of Spring Branch and the Colorado River in Bastrop County, Texas.

INFORMATION SECTION

To view the complete issued notices, view the notices on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at 512-239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200603803

LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: July 19, 2006

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Notice of Water Rights Application

Notices issued July 17, 2006

APPLICATION NO. 5916; San Antonio River Authority, P.O. Box 839980, San Antonio, Texas 78283, Applicant, has applied for a Water Use Permit to use the bed and banks of Martinez Creek to convey discharge water downstream from two wastewater treatment plants to a proposed diversion point on Martinez Creek and to divert and reuse not to exceed 4,039 acre-feet of historically discharged treated groundwater based effluent from two treatment plants located on Martinez Creek, San Antonio River Basin, Bexar County for agricultural purposes, municipal, and industrial purposes. The application was received on August 23, 2005. Additional information and fees for the application was received on November 18, 2005, and January 23&26, March 20, April 12, and May 16, and June 20, 2006. The application was declared administratively complete and accepted for filing on May 22, 2006. Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below by August 24, 2006.

APPLICATION NO. 5917; San Antonio River Authority, P.O. Box 839980, San Antonio, Texas 78283, Applicant, has applied for a Water Use Permit to use the bed and banks of Escondido and Martinez Creeks, San Antonio River Basin to convey discharged water from three treatment plants to a proposed downstream diversion point and to divert and reuse future discharges of treated groundwater based effluent for municipal, agricultural (irrigation) and industrial purposes in Bexar County. The application was received on August 23, 2005. Additional information and fees were received on November 18, 2005, January 26, March 20, April 12, May 16, and June 20, 2006. The application was accepted for filing and declared administratively complete on May 19, 2006. Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below by August 24, 2006.

INFORMATION SECTION

To view the complete issued notices, view the notices on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to

the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200603804
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: July 19, 2006

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Public Notice - Shutdown Orders

The Texas Commission on Environmental Quality (commission) staff is providing an opportunity for written public comment on the listed Shutdown Orders (SOs). Texas Water Code (TWC), §26.3475 authorizes the commission to order the shutdown of any underground storage tank (UST) system found to be noncompliant with release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection regulations of the commission, until such time as the owner/operator brings the UST system into compliance with those regulations. The commission proposes an SO after the owner or operator of a UST facility fails to perform required corrective actions within 30 days after receiving notice of the release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection violations documented at the facility. In accordance with TWC, §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **August 28, 2006**. The commission will consider any written comments received and the commission may withdraw or withhold approval of an SO if a comment discloses facts or considerations that indicate that consent to the proposed SO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed SO is not required to be published if those changes are made in response to written comments.

Copies of each of the proposed SOs is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the SO shall be sent to the attorney designated for the SO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on August 28, 2006**. Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission attorneys are available to discuss the SOs and/or the comment procedure at the listed phone numbers; however, comments on the SOs shall be submitted to the commission in **writing**.

(1) COMPANY: ECO Himal Incorporated dba Denton Food Mart; DOCKET NUMBER: 2005- 1832-PST-E; TCEQ ID NUMBER: RN101447076; LOCATION: 4101 Denton Highway, Haltom City, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.51(b)(2)(C) and Texas Water Code (TWC), §26.3475(c)(2), by failing to equip each underground storage tank (UST) with a valve or other device designed to automatically shut off the flow of regulated substances into the tank when the liquid level in the tank reaches a preset level no higher than the 95% capacity level for the tank; 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the USTs for release at a frequency of at least once per month thereby failing to comply with requirements for tank release detection equipment; 30 TAC §334.50(b)(2)(A)(i)(III) and TWC, §26.3475(a), by failing to test the line leak detector at least once per year for performance and operational reliability and thereby failing to provide proper release detection for the pressurized piping associated with the USTs at the facility; 30 TAC §334.50(d)(1)(B)(ii) and TWC, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records at least once a month, sufficiently accurate to detect a release as small as the sum of 1.0% of the total substance flow through for the month plus 130 gallons thereby failing to comply with the requirements for tank release detection equipment; PENALTY: $3,570; STAFF ATTORNEY: Robert Mosley, Litigation Division, MC 175, (512) 239-0627; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200603787
Mary Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: July 18, 2006

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Texas Statewide Health Coordinating Council

Notice of Opportunity for Public Comment

The Statewide Health Coordinating Council is pleased to submit its biennial update to the *2005-2010 Texas State Health Plan*, the **2007-2008 Texas State Health Plan Update**, as required by Health and Safety Code, Chapter 104, for public comment.

A copy of the proposed report and general instructions may be found at: http://www.dshs.state.tx.us/chs/shcc. You may also obtain a copy of the documents and instructions by contacting Rhonda Pointer at (512) 458-7111, extension 6575.

Comments must be received or postmarked by 5:00 p.m. on Wednesday, August 16, 2006, to be considered in connection with development of the final version of its report. If you have any questions regarding these reports, submission of public comment, or any general inquiries, you may contact Rhonda Pointer using the contact information above.

TRD-200603801
Ben G. Raimer, M.D.
Chairman
Texas Statewide Health Coordinating Council
Filed: July 19, 2006

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Notice of Opportunity for Public Comment

The Health Information Technology Advisory Committee of the Statewide Health Coordinating Council is pleased to submit its proposed report, *Roadmap for the Mobilization of Electronic Healthcare Information in Texas*, as required by Health and Safety Code, Chapter 104, as amended by Senate Bill 45, 79th Regular Session of the Texas Legislature, for public comment.

A copy of the proposed report, a template for comment submission, and general instructions may be found at:

http://www.dshs.state.tx.us/chs/shcc. You may also obtain a copy of the documents and instructions by contacting Rhonda Pointer at (512) 458-7111, extension 6575.

Comments must be received or postmarked by 5:00 p.m. on Friday, August 18, 2006, to be considered in connection with development of the final version of its report. If you have any questions regarding these reports, submission of public comment, or any general inquiries, you may contact Rhonda Pointer using the contact information above.

TRD-200603802
Ben G. Raimer, M.D.
Chairman
Texas Statewide Health Coordinating Council
Filed: July 19, 2006

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Department of State Health Services

Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend -ment #	Date of Action
Corpus Christi	Del Mar College	L06002	Corpus Christi	00	07/03/06
Houston	Okomed Downtown Imaging	L05966	Houston	00	07/07/06
Houston	Rice University Department of Earth Science MS-126	L05986	Houston	00	07/10/06
Plano	Texas Heart Hospital of the Southwest LLP DBA The Heart Hospital Baylor Plano	L06004	Plano	00	07/10/06
Throughout Tx	Permian Nondestructive Testing Inc	L06001	Odessa	00	07/11/06

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Austin	Columbia St. Davids Healthcare System DBA South Austin Hospital	L03273	Austin	63	06/30/06
Austin	St. Davids Healthcare Partnership LP LLP DBA St. Davids Medical Center	L05856	Austin	05	07/06/06
Austin	Texas Cardiovascular Consultants PA	L05246	Austin	21	07/13/06
Arlington	Columbia Medical Center of Arlington Sub LP	L02228	Arlington	64	07/06/06
Baytown	Exxonmobil Refining and Supply Company	L01134	Baytown	61	07/10/06
Beaumont	Exxonmobil Oil Corporation	L00603	Beaumont	73	07/10/06
Beaumont	Exxonmobil Oil Corporation	L00603	Beaumont	74	07/12/06
Bellaire	Texas Nuclear Imaging Inc DBA Excel Diagnostics Imaging Clinic Medical Center	L05009	Bellaire	30	07/03/06
Borger	ConocoPhillips Company DBA Borger Refinery and NGL Center	L02480	Borger	46	07/10/06
Burnet	Daughters of Charity Health Services of Austin DBA Seton Highland Lakes	L03515	Burnet	31	07/06/06
Corpus Christi	Citgo Refining and Chemicals Company LP	L00243	Corpus Christi	37	07/13/06
Corpus Christi	Flint Hills Resources LP	L00322	Corpus Christi	39	07/13/06
Crockett	East Texas Medical Center Crockett	L01411	Crockett	29	07/03/06
Dallas	Cardiology Consultants of Texas	L04997	Dallas	35	07/10/06
Dallas	North Texas Heart Center PA	L04608	Dallas	31	07/06/06
Dallas	Presbyterian Hospital of Dallas	L01586	Dallas	88	07/06/06
Dallas	The Center for Molecular Imaging LP DBA Southwest Diagnostic Center for Molecular Imaging	L05715	Dallas	03	06/30/06
Deer Park	Shell Chemical LP	L04933	Deer Park	17	07/13/06
El Paso	R E Thomason General Hospital	L00502	El Paso	60	07/06/06
Fort Worth	Radiology Associates	L03953	Fort Worth	39	07/14/06
Fort Worth	Texas Oncology	L05606	Fort Worth	10	07/13/06
Galveston	The University of Texas Medical Branch	L01299	Galveston	71	07/03/06
Hallettsville	Lavaca Medical Center	L04397	Hallettsville	09	07/07/06
Houston	American Diagnostic Tech LLC	L05514	Houston	27	07/06/06
Houston	Baylor College of Medicine Office of Environmental Safety	L00680	Houston	91	07/11/06
Houston	Diagnos Inc DBA Diagnos PET CT Imaging	L05971	Houston	01	07/06/06
Houston	Institute of Biosciences and Technology	L04681	Houston	22	07/11/06
Houston	Kellogg Brown & Root Inc	L03660	Houston	15	07/06/06
Houston	Mallinckrodt Medical Inc	L03008	Houston	74	07/11/06
Houston	Memorial Hermann Hospital System Inc DBA Memorial Hermann Hospital	L00650	Houston	78	07/07/06

AMENDMENTS TO EXISTING LICENSES ISSUED (CONTINUED):

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	Real Inspection Training Engineering	L05136	Houston	15	07/10/06
Houston	Southwest Environmental Laboratories Inc	L03743	Houston	07	07/13/06
Katy	Hector Ubaldo MD PA DBA Physicians of Katy	L05876	Katy	03	07/07/06
La Porte	Ineos USA LLC Battleground Manufacturing Complex	L00088	La Porte	54	07/11/06
Laredo	Laredo Texas Hospital Company LP DBA Laredo Medical Center	L01306	Laredo	54	07/06/06
McAllen	Advanced Nuclear Imaging Inc	L05467	McAllen	07	07/10/06
Mineral Wells	Palo Pinto General Hospital	L01732	Mineral Wells	31	07/10/06
Mission	South Texas Imaging Center-K PA DBA Stic-K	L05636	Mission	04	07/03/06
Nacogdoches	The Heart Doctor Imaging Center	L05894	Nacogdoches	01	07/10/06
Navasota	St Joseph Regional Health Center DBA Grimes St Joseph Health Center	L05968	Navasota	01	07/11/06
Odessa	Texas Oncology PA DBA West Texas Cancer Center	L04984	Odessa	03	07/03/06
Odessa	Texas Oncology PA DBA West Texas Cancer Center	L05140	Odessa	07	07/13/06
Pasadena	Mohamed O Jeroudi MD PA	L05753	Pasadena	08	07/05/06
Richardson	Raytheon Company	L04096	Richardson	23	07/05/06
San Antonio	ACA SA LTD DBA Sendero Imaging & Treatment Center	L05567	San Antonio	12	07/06/06
Texas City	Sterling Chemical Inc	L03952	Texas City	19	07/13/06
The Woodlands	Lexicon Genetics Incorporated	L04932	The Woodlands	14	07/12/06
Tyler	Trinity Mother Frances Health System	L01670	Tyler	124	07/07/06
Webster	Cardiovascular Associates of Clear Lake PA	L05549	Webster	06	07/06/06
Webster	Roger C Willette MD PA DBA Space Center Medical Clinic	L05466	Webster	05	07/03/06
Wichita Falls	United Regional Health Care System	L00350	Wichita Falls	102	07/06/06
Throughout Tx	Team Industrial Services Inc	L00087	Alvin	146	07/10/06
Throughout Tx	Team Industrial Services Inc	L00087	Alvin	147	07/13/06
Throughout Tx	Texas Department of Transportation	L00197	Austin	116	07/13/06
Throughout Tx	Terra-Mar Inc	L03157	Fort Worth	48	07/06/06
Throughout Tx	Weatherford US LP	L05291	Fort Worth	12	07/13/06
Throughout Tx	Costal Testing Laboratories Inc	L01945	Houston	27	07/10/06
Throughout Tx	Halliburton Energy Services Inc	L00442	Houston	107	07/05/06
Throughout Tx	Halliburton Energy Services Inc	L00442	Houston	108	07/13/06
Throughout Tx	Halliburton Energy Services Inc	L03284	Houston	31	07/05/06
Throughout Tx	Kendall Inc	L05572	Houston	02	07/13/06
Throughout Tx	Material Inspection Technology Inc	L05672	Houston	18	07/12/06
Throughout Tx	Metco	L03018	Houston	161	07/10/06
Throughout Tx	Professional Service Industries Inc	L04942	Houston	20	07/06/06
Throughout Tx	Stork Southwestern Laboratories Inc	L05269	Houston	11	07/14/05
Throughout Tx	MDS Nordion Inc	L00721	Kanata Ontario	50	07/05/06
Throughout Tx	Big State X-Ray	L02693	Odessa	53	07/03/06
Throughout Tx	Desert Industrial X-Ray LP	L04590	Odessa	54	07/10/06
Throughout Tx	T C Inspections Inc	L05833	Oyster Creek	14	07/13/06
Throughout Tx	T C Inspections Inc	L05833	Oyster Creek	15	07/13/06
Throughout Tx	Conam Inspection & Engineering Inc	L05010	Pasadena	112	07/12/06
Throughout Tx	Midwest Inspection Services	L03120	Perryton	92	07/10/06
Throughout Tx	United Surveys Inc	L01570	Rosenberg	22	07/13/06
Throughout Tx	Schlumberger Technology Corporation	L01833	Sugar Land	130	07/12/06
Throughout Tx	BJ Services Company USA	L02684	Tomball	53	07/13/06
Throughout Tx	Gray Wireline Service Inc	L03541	Weatherford	19	07/10/06

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend -ment #	Date of Action
El Paso	EP Premier Medical Group PA	L05198	El Paso	08	07/03/06
El Paso	Maple Chase Company DBA Invensys Controls	L03815	El Paso	14	07/10/06
El Paso	Texas Imaging Services of El Paso Inc DBA Open MRI of El Paso	L05207	El Paso	05	07/06/06
Irving	Columbia Medical Center of Las Colinas Inc DBA Las Colinas Medical Center	L05084	Irving	11	07/06/06
Houston	Houston Medical Imaging	L05184	Houston	08	07/11/06
Nacogdoches	Stephen F Austin State University	L05191	Nacogdoches	04	07/03/06
North Richland	Columbia North Hills Hospital Subsidiary LP DBA North Hills Hospital	L02271	North Richland	51	07/11/06
San Antonio	Alamo Heart Associates PA	L04909	San Antonio	08	07/07/06
San Antonio	Radiology Associates of San Antonio PA	L04927	San Antonio	26	07/03/06
Throughout Tx	DMG Equipment Co LTD DBA Pavers Supply Company	L04856	Conroe	07	07/12/06

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
El Paso	Mölnlycke Health Care Inc	L04178	El Paso	14	07/10/06
El Paso	Philips Lighting Company	L03823	El Paso	16	07/13/06
Throughout Tx	Oilfield Prolog Services Inc DBA Prolog	L01828	Denver City	29	07/10/06

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of Title 25 Texas Administrative Code (TAC), Chapter 289 regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC, Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC, Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3189. For information call (512) 834-6688.

TRD-200603798
Cathy Campbell
General Counsel
Department of State Health Services
Filed: July 19, 2006

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Public Comment Submission Concerning Personal Emergency Response System Providers

The Department of State Health Services (department) submitted proposed new rules (25 Texas Administrative Code, §§140.30 - 140.47) concerning Personal Emergency Response System Providers (PERS). The rules were published in the July 21, 2006, issue of the *Texas Register*.

This notice corrects an error in the preamble to the rules which indicated the e-mail address for the PERS Program of the department as pers@dshs.state.tx.us, and reflects its correct location at PERSAlarm@dshs.state.tx.us.

Accordingly, comments on the proposal may be submitted to Richard R. Rees, Professional Licensing and Certification Unit, Division for Regulatory Services, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, telephone (512) 834-4565, or by e-mail to PERSAlarm@dshs.state.tx.us. When e-mailing comments, please indicate "Comments on Proposed Rules" in the subject line.

TRD-200603820
Cathy Campbell
General Counsel
Department of State Health Services
Filed: July 19, 2006

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Texas Department of Housing and Community Affairs

Request for Proposal for Tax Credit Counsel

SUMMARY. The Texas Department of Housing and Community Affairs (TDHCA), through its Legal Services Division, is issuing a Request for Proposals (RFP) for outside counsel in connection with TDHCA's administration of its low income housing tax credit matters.

DEADLINE FOR SUBMISSION. The deadline for submission in response to the Request for Proposals is 4:00 p.m., Central Daylight Saving Time, Wednesday, August 23, 2006. No proposal received after the deadline will be considered.

TDHCA reserves the right to accept or reject any (or all) proposals submitted. The information contained in this proposal request is intended to serve only as a general description of the services desired by TDHCA, and TDHCA intends to use responses as a basis for further negotiation of specific project details with offerors. This request does not commit TDHCA to pay for any costs incurred prior to the execution of a contract and is subject to availability of funds. Issuance of this request for proposals in no way obligates TDHCA to award a contract or to pay any costs incurred in the preparation of a response.

Law firms interested in submitting a proposal should contact Mr. Kevin Hamby, General Counsel, at (512) 475-3948, Ext. 221, East 11th. Street, Austin, TX 78701 or visit our website at www.tdhca.state.tx.us, for a complete copy of the RFP. Communication with any member of the board, the executive director, or TDHCA staff other than Mr. Hamby, concerning any matter related to this request for proposals is grounds for immediate disqualification.

TRD-200603781
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: July 17, 2006

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Texas Department of Insurance

Company Licensing

Application to change the name of NGL AMERICAN LIFE INSURANCE COMPANY to THE SETTLERS LIFE INSURANCE COMPANY, a foreign life, accident and/or health company. The home office is in Bristol, Virginia.

Application for incorporation to the State of Texas by SENTRUITY CASUALTY COMPANY, a domestic fire and/ or casualty company. The home office is in Houston, Texas.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the Texas Register publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200603815
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: July 19, 2006

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for admission to Texas of GROUP DENTAL SERVICE, INC. (using the assumed name of GROUP DENTAL SERVICE ADMINISTRATORS, INC.), a foreign third party administrator. The home office is ROCKVILLE, MARYLAND.

Application to change the name of GROUP ADMINISTRATORS - SAN ANTONIO, INC. to VERITY NATIONAL GROUP, INC., a domestic third party administrator. The home office is SAN ANTONIO, TEXAS.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of Matt Ray, MC 107-1A, 333 Guadalupe, Austin, Texas 78701.

TRD-200603813
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: July 19, 2006

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Texas Department of Insurance, Division of Workers' Compensation

Correction of Error

The Texas Department of Insurance, Division of Workers' Compensation adopted new rule, 28 TAC §126.14, in the July 7, 2006, issue of the *Texas Register* (31 TexReg 5458). The first sentence of the last paragraph on page 5459 incorrectly references the Labor Code, §409.021. The sentence should read as follows:

"Agency Response: The Labor Code §408.0042 has not changed or superseded §408.021."

TRD-200603790

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Texas Lottery Commission

Instant Game Number 693 "Go for the Gold"

1.0. Name and Style of Game.

A. The name of Instant Game Number 693 is "GO FOR THE GOLD." The play style is "key number match with auto win."

1.1. Price of Instant Ticket.

A. Tickets for Instant Game Number 693 shall be $10.00 per ticket.

1.2. Definitions in Instant Game Number 693.

A. Display Printing--That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint--The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol--The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, STAR SYMBOL, GOLD SYMBOL, $1.00, $2.00, $4.00, $5.00, $10.00, $15.00, $20.00, $50.00, $100, $250, $500, $1,000, $10,000, $25,000, $100,000 and $250,000.

D. Play Symbol Caption--The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 693 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
STAR SYMBOL	AUTO
GOLD SYMBOL	WINX10
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$

$10.00	TEN$
$15.00	FIFTEEN
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$250	TWO FTY
$500	FIV HUND
$1,000	ONE THOU
$10,000	TEN THOU
$25,000	25 THOU
$100,000	HUN THOU
$250,000	TFY THOU

E. Retailer Validation Code--Three letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 693 - 1.2E

CODE	PRIZE
TEN	$10.00
FTN	$15.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number--A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four digit Security Number placed randomly within the Serial Number. The remaining nine digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

G. Low-Tier Prize--A prize of $10.00, $15.00 or $20.00.

H. Mid-Tier Prize--A prize of $50.00, $100, $250 or $500.

I. High-Tier Prize--A prize of $1,000, $10,000 or $250,000.

J. Bar Code--A 22 character interleaved two of five bar code which will include a three digit game ID, the seven digit pack number, the three digit ticket number and the nine digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number--A 13 digit number consisting of the three digit game number (693), a seven digit pack number, and a three digit ticket number. Ticket numbers start with 001 and end with 050 within each pack. The format will be: 693-0000001-001.

L. Pack--A pack of "GO FOR THE GOLD" Instant Game tickets contains 050 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one. Ticket back 050 will be exposed on one side of the pack and ticket 001 on the other side.

M. Non-Winning Ticket--A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket--A Texas Lottery "GO FOR THE GOLD" Instant Game Number 693 ticket.

2.0. Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule, §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "GO FOR THE GOLD" Instant Game is determined once the latex on the ticket is scratched off to expose 55 Play Symbols. If a player matches any of YOUR NUMBERS play symbols to any of the WINNING NUMBERS play symbols, the player wins the prize shown for that number. If a player reveals a "STAR" play symbol, the player wins that prize shown instantly. If a player reveals a "GOLD" play symbol, the player wins 10 times the prize shown instantly. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1. Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 55 Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 55 Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 55 Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 55 Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2. Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No more than three identical non-winning prize symbols will appear on a ticket.

C. No duplicate WINNING NUMBERS play symbols on a ticket.

D. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

E. Non-winning prize symbols will never be the same as the winning prize symbol(s).

F. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 5 and $5).

2.3. Procedure for Claiming Prizes.

A. To claim a "GO FOR THE GOLD" Instant Game prize of $10.00, $15.00, $20.00, $50.00, $100, $250 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $100, $250 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "GO FOR THE GOLD" Instant Game prize of $1,000, $10,000 or $250,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "GO FOR THE GOLD" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4. Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5. Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "GO FOR THE GOLD" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6. If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "GO FOR THE GOLD" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7. Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8. Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0. Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0. Number and Value of Instant Prizes. There will be approximately 3,000,000 tickets in the Instant Game Number 693. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 693 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$10	600,000	5.00
$15	180,000	16.67
$20	150,000	20.00
$50	60,000	50.00
$100	21,000	142.86
$250	6,250	480.00
$500	2,375	1,263.16
$1,000	32	93,750.00
$10,000	6	500,000.00
$250,000	5	600,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 2.94. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0. End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game Number 693 without advance notice, at which point no further tickets in that game may be sold.

6.0. Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game Number 693, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200603794
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: July 18, 2006

♦ ♦ ♦

Instant Game Number 733 "Run the Table"

1.0 Name and Style of Game.

A. The name of Instant Game No. 733 is ”RUN THE TABLE”. The play style for game BLACKJACK is ”beat score with doubler". A = 11; J, Q, K = 10. The play style for game ROULETTE is ”key number match”. The play style for game SLOTS is ”three in a line with prize legend”. The play style for game DICE is ”add up”. The play style for game HIT ME is ”key symbol match with auto win”.

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 733 shall be $25.00 per ticket.

1.2 Definitions in Instant Game No. 733.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: A CARD SYMBOL, K CARD SYMBOL, Q CARD SYMBOL, J CARD SYMBOL, 10 CARD SYMBOL, 9 CARD SYMBOL, 8 CARD SYMBOL, 7 CARD SYMBOL, 6 CARD SYMBOL, 5 CARD SYMBOL, 4 CARD SYMBOL, 3 CARD SYMBOL, 2 CARD SYMBOL, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, BUSTS SYMBOL, 7 SYMBOL, GOLD BAR SYMBOL, HORSE SHOE SYMBOL, BELL SYMBOL, DOLLAR SIGN SYMBOL, POT OF GOLD SYMBOL, STAR SYMBOL, DIAMOND SYMBOL, ONE DICE SYMBOL, TWO DICE SYMBOL, THREE DICE SYMBOL, FOUR DICE SYMBOL, FIVE DICE SYMBOL, SIX DICE SYMBOL, $5.00, $10.00, $20.00, $25.00, $30.00, $40.00, $50.00, $100, $200, $500, $1,000, $2,000, $10,000, $20,000 and ONE MILL SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 733 - 1.2D

PLAY SYMBOL	CAPTION
A CARD SYMBOL	ACE
K CARD SYMBOL	KNG
Q CARD SYMBOL	QUN
J CARD SYMBOL	JCK
10 CARD SYMBOL	TEN
9 CARD SYMBOL	NIN
8 CARD SYMBOL	EGT
7 CARD SYMBOL	SVN
6 CARD SYMBOL	SIX
5 CARD SYMBOL	FIV
4 CARD SYMBOL	FOR
3 CARD SYMBOL	THR
2 CARD SYMBOL	TWO
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
BUSTS SYMBOL	BUSTS
7 SYMBOL	SEVN
GOLD BAR SYMBOL	GBAR
HORSE SHOE SYMBOL	SHOE
BELL SYMBOL	BELL
DOLLAR SIGN SYMBOL	DOLR
POT OF GOLD SYMBOL	GPOT
STAR SYMBOL	STAR
DIAMOND SYMBOL	DIAM

ONE DICE SYMBOL	ONE
TWO DICE SYMBOL	TWO
THREE DICE SYMBOL	THR
FOUR DICE SYMBOL	FOR
FIVE DICE SYMBOL	FIV
SIX DICE SYMBOL	SIX
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$25.00	TWY FIV
$30.00	THIRTY
$40.00	FORTY
$50.00	FIFTY
$100	ONE HUND
$200	TWO HUND
$500	FIV HUND
$1,000	ONE THOU
$2,000	TWO THOU
$10,000	TEN THOU
$20,000	20 THOU
$ONE MILL	ONE MIL

E. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

F. Mid-Tier Prize - A prize of $25.00, $30.00, $40.00, $50.00, $100, $200 or $500.

G. High-Tier Prize - A prize of $1,000, $2,000, $10,000, $20,000 or $1,000,000.

H. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

I. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (733), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 025 within each pack. The format will be: 733-0000001-001.

J. Pack - A pack of "RUN THE TABLE" Instant Game tickets contains 025 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 025 while the other fold will show the back of ticket 001 and front of 025.

K. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

L. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "RUN THE TABLE" Instant Game No. 733 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "RUN THE TABLE" Instant Game is determined once the latex on the ticket is scratched off to expose 54 (fifty-four) Play Symbols. In the game BLACKJACK (2 games), if the total in any PLAYER'S hand play symbols beat the DEALER'S hand play symbols, the player wins PRIZE for that PLAYER. If the total for any PLAYER equals 21, the player wins DOUBLE the PRIZE for that PLAYER. If DEALER reveals a "BUSTS" play symbol, the player wins all five prizes. A=11; J,Q,K=10. In the game ROULETTE, if YOUR NUMBER matches any number on the Roulette Wheel, the player wins the prize shown for that number. In the game SLOTS, if a player reveals three (3) matching play symbols in the same SPIN in a horizontal line across, the player wins prize shown in legend. In the game DICE, if a player's YOUR DICE play symbols total 7 or 11 within a ROLL, the player wins the PRIZE shown for that ROLL. In the game HIT ME, if a player reveals a "21" symbol, the player wins $50 instantly. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 54 (fifty-four) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 54 (fifty-four) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 54 (fifty-four) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 54 (fifty-four) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. BLACKJACK (2 Games): No ties between a PLAYER'S hand and the DEALER'S hand.

C. BLACKJACK (2 games): The doubler feature will only appear as dictated by the prize structure and will be approximately evenly split between the two Blackjack games.

D. BLACKJACK (2 games): No duplicate non-winning prize symbols.

E. BLACKJACK (2 games): No duplicate non-winning hands within a game.

F. BLACKJACK (2 games): The DEALER'S hand will never be the same symbol on both games unless at least one PLAYER'S hand contains a winning hand.

G. ROULETTE: No duplicate non-winning play symbols.

H. ROULETTE: No duplicate non-winning prize symbols.

I. ROULETTE: No prize amount in a non-winning spot will correspond with the Roulette Number play symbol (i.e. 5 and $5).

J. ROULETTE: Non-winning prize symbols will never be the same as the winning prize symbol(s) in this game.

K. SLOTS: No duplicate non-winning spins in any order.

L. SLOTS: No three matching non-winning symbols will appear in a vertical or diagonal line.

M. DICE: No duplicate rolls.

N. DICE: No duplicate non-winning prize symbols.

2.3 Procedure for Claiming Prizes.

A. To claim a "RUN THE TABLE" Instant Game prize of $25.00, $30.00, $40.00, $50.00, $100, $200 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $25.00, $30.00, $40.00, $50.00, $100, $200 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "RUN THE TABLE" Instant Game prize of $1,000, $2,000, $10,000 or $20,000 the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by

the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. To claim a "RUN THE TABLE" Instant Game prize of $1,000,000, the claimant must sign the winning ticket and present it at the Texas Lottery Commission Claim Center. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. The Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. As an alternative method of claiming a "RUN THE TABLE" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

E. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

F. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "RUN THE TABLE" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "RUN THE TABLE" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 4,080,000 tickets in the Instant Game No. 733. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 733 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$25	979,200	4.17
$30	408,000	10.00
$40	204,000	20.00
$50	163,200	25.00
$100	78,200	52.17
$200	13,940	292.68
$500	3,740	1,090.91
$1,000	1,020	4,000.00
$2,000	850	4,800.00
$10,000	170	24,000.00
$20,000	50	81,600.00
$1,000,000	3	1,360,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 2.20. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 733 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 733, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200603821
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: July 19, 2006

♦ ♦ ♦

Public Utility Commission of Texas

Announcement of Amendment to Application for State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on July 12, 2006, for a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Texas and Kansas City Cable Partners, L.P., doing business as Time Warner Cable, for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 32933 before the Public Utility Commission of Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 32933.

TRD-200603791
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 18, 2006

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Announcement of Amendment to Application for State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on July 14, 2006, for a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Comcast of Texas II, L.P. for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 32940 before the Public Utility Commission of Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text tele-

phone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 32940.

TRD-200603792
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 18, 2006

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Notice of Application for a Certificate to Provide Retail Electric Service

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on July 10, 2006, for retail electric provider (REP) certification, pursuant to §§39.101-39.109 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Consulting Groups Network, LLC for Retail Electric Provider (REP) certification, Docket Number 32916 before the Public Utility Commission of Texas.

Applicant's requested service area by geography includes the entire State of Texas.

Persons wishing to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than August 4, 2006. Hearing and speech- impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 32916.

TRD-200603723
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 12, 2006

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on July 11, 2006, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151-54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Globetel, Inc., d/b/a Allo Telecommunications, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 32919 before the Public Utility Commission of Texas.

Applicant intends to provide optical services, T1-Private Line, Fractional T1, and Digital PBX Services.

Applicant's requested SPCOA geographic area includes the areas with local access and transport area 560 and 552 served by AT&T Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than August 2, 2006. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936- 7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 32919.

TRD-200603741
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 13, 2006

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Stephen F. Austin State University

Notice of Consultant Contract Availability

Stephen F. Austin State University, Nacogdoches, Texas, requests proposals from technology firms specializing in asset tracking systems.

PURPOSE: Stephen F. Austin State University desires to implement an RFID property tracking system. The University utilizes the State Property Accounting database, downloading it daily to populate an Oracle database from which reports can be derived and information provided to campus departments in an electronic, easy to access format. The property tracking system will primarily be used to automate the annual physical inventory process, providing discrepancy reports related to property located or not located through the scanning process. It will also be used for on-going physical inventory audits to assist in keeping tracking of current equipment locations. Customized software for uploading data from the Oracle database to the scanners, for scanning and reporting found and not-found items, and downloading data from the scanners to a Windows-based PC will be required as well as custom reports.

PROPOSAL FORMAT: Interested parties must submit proposal with the following information: references, experience, qualifications, and pricing for equipment, including two (2) RFID scanners with cradles, custom software, training, on-site support, custom reports, and annual maintenance. Reimbursable costs such as travel, lodging, meals, etc. must be identified and noted to be at cost. Provide the name, address, and phone number of the individual assigned to the account, and the vendor identification number/tax identification number of the applicant.

DEADLINES: Proposals must be received in the office of Diana Boubel, Director of Purchasing & Inventory, Stephen F. Austin State University, P. O. Box 13030, 2124 Wilson Drive, Nacogdoches, Texas 75962 by 5:00 p.m., August 1, 2006, in order to be considered.

TRD-200603782
R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: July 17, 2006

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Texas Department of Transportation

Aviation Division - Request for Proposal for Aviation Engineering Services

The City of Floydada, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below:

Airport Sponsor: City of Floydada, Floydada Municipal Airport. TxDOT CSJ No.:0605FLODA. Scope: Provide engineering/design services to construct turf crosswind runway, install fencing, and bury powerline at State Highway 207.

The DBE goal is set at 8%. TxDOT Project Manager is Russell Deason.

To assist in your proposal preparation, the most recent Airport Layout Plan, 5010 drawing, and project description are available online at **www.dot.state.tx.us/avn/avninfo/notice/consult/index.htm** by selecting "Floydada Municipal Airport".

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal". The form may be requested from TxDOT Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be e-mailed by request or downloaded from the TxDOT web site, URL address **http://www.dot.state.tx.us/forms/aviation/550.doc**. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT. ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is an MS Word Template.

Please note:

Four completed, unfolded copies of Form AVN-550 **must be received** by TxDOT, Aviation at 150 E. Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than **Tuesday, August 22, 2006, at 4:00 p.m.** Electronic facsimiles or forms sent by e-mail will not be accepted. Please mark the envelope of the forms to the attention of Amy Slaughter.

The Consultant Selection Committee (committee) will be composed of local government members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating engineering proposals can be found at **http://www.dot.state.tx.us/services/aviation/consultant.htm**. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The committee does, however, reserve the right to conduct interviews of the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following the interviews.

If there are any procedural questions, please contact Amy Slaughter, Grant Manager, or Russell Deason, Project Manager, for technical questions at 1-800-68-PILOT (74568).

TRD-200603742
Bob Jackson
Interim General Counsel
Texas Department of Transportation
Filed: July 14, 2006

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Cancellation of Public Hearing - 43 TAC §18.16, Insurance Requirements

Texas Department of Transportation is cancelling the public hearing scheduled for 9:00 am on August 1, 2006 at the Dewitt C. Greer Building, 125 East 11th St., Austin, Texas, concerning proposed rules governing insurance requirements for household goods carriers. The proposed rule appeared in the July 14, 2006, issue of the *Texas Register* (31 TexReg 5589).

TRD-200603797
Bob Jackson
Interim General Counsel
Texas Department of Transportation
Filed: July 19, 2006

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Public Notice - Creation of Specialty License Plates

Pursuant to Title 43, Texas Administrative Code, §17.28(i)(1)(B), the Texas Department of Transportation is required to publish notice of all tentatively approved specialty license plates for public comment. The department will accept comments on the specialty license plates listed below.

The specialty license plates tentatively approved and open for comment are: Silver Star and Texas Association of Realtors. These two plates will have qualifying restrictions. The Silver Star (Military) license plate will only be available to recipients of the Silver Star. The Texas Association of Realtors license plate will only be available to members of that organization. License plate images may be viewed at: **www.dot.state.tx.us/services/vehicle_titles_and_registration/specialty_plates**. All comments will be considered prior to the final decision.

Please submit comments to Rebecca Davio, Director, Vehicle Titles and Registration Division, Texas Department of Transportation, 125 East 11th St., Austin, Texas 78701. The deadline for receipt of comments is 5:00 p.m. on August 28, 2006. For questions regarding these license plates or the comment procedures contact Duane Pufpaff at (512) 302-2039.

TRD-200603784
Bob Jackson
Interim General Counsel
Texas Department of Transportation
Filed: July 18, 2006

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Request for Qualifications and Proposals for Area Engineer/Maintenance Facility, Waco - Contract # CBC4704-00-672

The Texas Department of Transportation (TxDOT), an agency of the State of Texas, is issuing this REQUEST FOR QUALIFICATIONS AND PROPOSALS (RFQ/RFP) to select from prospective qualified Design-Build Firms (D-B), who can design, develop, and construct a TxDOT area engineer/maintenance facility in Waco, McLennan County, Texas hereinafter referred to as the project (project), in exchange for the existing Waco Area Engineer/Maintenance Facility located at 7108 Woodway Drive, Waco, McLennan County, Texas.

TxDOT is issuing this RFQ/RFP in accordance with Transportation Code, §201.1055, Agreements with Private Entities, (House Bill 2702, 79th Legislative Session) "that authorizes the department and a private entity that offers the best value to the state to enter into an agreement for the acquisition, design, construction, renovation, including site and site development, of a building or other facility required to support department operations."

A pre-submittal conference is scheduled for Tuesday, September 5, 2006, at 1:00 P.M., at the TxDOT Waco Area Engineer/Maintenance Facility, 7108 Woodway Drive, Waco, McLennan County, Texas. The conference agenda will include a presentation of the proposed project, a question and answer session, and guided tour of property proposed

for exchange. Attendance at the pre-submittal conference is MANDATORY.

A complete RFQ/RFP with description of the project, requirements, evaluation, forms, and attachments can be found at the following web site:

http://www.txdot.gov/MNT/contract/rfp.htm

The notice is also provided at

http://esbd.tbpc.state.tx.us/1380/sagency.cfm

(contract number CBC4704-00-672). TxDOT can mail a printed copy of the RFQ/RFP if a request is received by fax to (512) 416-3080 or at the Waco District Headquarters, 100 S. Loop Dr., Waco, Texas 76704, Telephone (254) 867-2700 or FAX (254) 867-2893.

DEADLINE: Sealed proposals must be received and time stamped by Monday, September 25, 2006, at 2:30 PM local time, at the Texas Department of Transportation, Waco District Headquarters, 100 S. Loop Dr., Waco, Texas 76704, ATTN: Michael Bassett.

TRD-200603819
Bob Jackson
Interim General Counsel
Texas Department of Transportation
Filed: July 19, 2006

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Request for Qualifications and Proposals for Contract # CBC4704-00-603 - Southwest Area Engineer/Maintenance Facility

The Texas Department of Transportation (TxDOT), an agency of the State of Texas, is issuing this REQUEST FOR QUALIFICATIONS AND PROPOSALS (RFQ/RFP) to select from prospective qualified Design-Build Firms (D-B), who can design, develop, and construct a new TxDOT Southwest Area Engineer/Maintenance facility in Cedar Hill, Dallas County, Texas hereinafter referred to as the project (project), in exchange for the existing Grand Prairie Maintenance Facility located at 4202 Corn Valley Road, Grand Prairie, Dallas County, Texas, 75052.

TxDOT is issuing this RFQ/RFP in accordance with Transportation Code, §201.1055, Agreements with Private Entities, (House Bill 2702, 79th Legislative Session) "that authorizes the department and a private entity that offers the best value to the state to enter into an agreement for the acquisition, design, construction, renovation, including site and site development, of a building or other facility required to support department operations."

A pre-submittal conference is schedule for Thursday, September 7, 2006, at 2:00 P.M., at the TxDOT Grand Prairie Maintenance Facility located at 4202 Corn Valley Road, Grand Prairie, Dallas County, Texas, 75052. The conference agenda will include a presentation of the proposed project, a question and answer session, and guided tour of property proposed for exchange. Attendance at the pre-submittal conference is MANDATORY.

A complete RFQ/RFP with description of the project, requirements, evaluation, forms, and attachments can be found at the following web site:

http://www.txdot.gov/MNT/contract/rfp.htm

The notice is also provided at:

http://esbd.tbpc.state.tx.us/1380/sagency.cfm

(contract number CBC4704-00-603. TxDOT can mail a printed copy of the RFQ/RFP if a request is received by fax to (512) 416-3080 or at the Dallas District Headquarters, 4777 E. Highway 80, Mesquite, Texas 75150-6643, Telephone (214) 320-6113 or FAX (214) 320-6117.

DEADLINE: Sealed proposals must be received and time stamped by Monday, September, 25, 2006, at 2:30 PM, local time at the Texas Department of Transportation, Dallas District Headquarters, 4777 E Highway 80, Mesquite, Texas 75150-6643, ATTN: Tim Powers.

TRD-200603816
Bob Jackson
Interim General Counsel
Texas Department of Transportation
Filed: July 19, 2006

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Request for Qualifications and Proposals for Contract # CBC4704-00-668 - Area Engineer/Maintenance Facility, Belton

The Texas Department of Transportation (TxDOT), an agency of the State of Texas, is issuing this REQUEST FOR QUALIFICATIONS AND PROPOSALS (RFQ/RFP) to select from prospective qualified Design-Build Firms (D-B), who can design, develop, and construct a TxDOT area engineer/maintenance facility in Belton, Bell County, Texas hereinafter referred to as the project (project), in exchange for the existing Belton Area Engineer/Maintenance facility located at 1502 Old Holland Road, Belton; the existing maintenance facility located at 2102 Martin Luther King Blvd., Killeen, 76541; and the existing maintenance facility located at 3801 North 3rd Street, Temple, 76501, Bell County, Texas.

TxDOT is issuing this RFQ/RFP in accordance with Transportation Code, §201.1055, Agreements with Private Entities, (House Bill 2702, 79th Legislative Session) "that authorizes the department and a private entity that offers the best value to the state to enter into an agreement for the acquisition, design, construction, renovation, including site and site development, of a building or other facility required to support department operations"

A pre-submittal conference is schedule for Tuesday, September 5, 2006, at 9:00 A.M., at the TxDOT Belton maintenance facility, 1502 Old Holland Road, Belton, Bell County, Texas. The conference agenda will include a presentation of the proposed project, a question and answer session, and guided tour of property proposed for exchange. Attendance at the pre-submittal conference is MANDATORY.

A complete RFQ/RFP with description of the project, requirements, evaluation, forms, and attachments can be found at the following web site:

http://www.txdot.gov/MNT/contract/rfp.htm

The notice is also provided at

http://esbd.tbpc.state.tx.us/1380/sagency.cfm

(contract number CBC4704-00-668). TxDOT can mail a printed copy of the RFQ/RFP if a request is received by fax to (512) 416-3080 or at the Waco District Headquarters, 100 S. Loop Dr., Waco, Texas 76704, Telephone (254) 867-2700 or FAX (254)867-2893.

DEADLINE: Sealed proposals must be received and time stamped by Monday, September 25, 2006, at 2:30 PM local time, at the Texas Department of Transportation, Waco District Headquarters, 100 S. Loop Drive, Waco, Texas 76704, ATTN: Michael Bassett.

TRD-200603818

Bob Jackson
Interim General Counsel
Texas Department of Transportation
Filed: July 19, 2006

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Request for Qualifications and Proposals for New Dallas Northeast Area Engineer/Maintenance Facility - Contract # CBC4704-00-604

The Texas Department of Transportation (TxDOT), an agency of the State of Texas, is issuing this REQUEST FOR QUALIFICATIONS AND PROPOSALS (RFQ/RFP) to select from prospective qualified Design-Build Firms (D-B), who can design, develop, and construct a new TxDOT Dallas Northeast Area Engineer/Maintenance facility in Garland, Dallas County, Texas hereinafter referred to as the project (project), in exchange for the existing Rockwall Maintenance Facility located at 901 East I-30, Rockwall, Rockwall County, Texas, 75087.

TxDOT is issuing this RFQ/RFP in accordance with Transportation Code, §201.1055, Agreements with Private Entities, (House Bill 2702, 79th Legislative Session) "that authorizes the department and a private entity that offers the best value to the state to enter into an agreement for the acquisition, design, construction, renovation, including site and site development, of a building or other facility required to support department operations."

A pre-submittal conference is scheduled for Thursday, September 7, 2006, at 10:00 A.M., at the TxDOT Rockwall Maintenance Facility located at 901 East I-30, Rockwall, Rockwall County, Texas, 75087. The conference agenda will include a presentation of the proposed project, a question and answer session, and guided tour of property proposed for exchange. Attendance at the pre-submittal conference is MANDATORY.

A complete RFQ/RFP with description of the project, requirements, evaluation, forms, and attachments can be found at the following web site:

http://www.txdot.gov/MNT/contract/rfp.htm

The notice is also provided at a the following website (contract number CBC4704-00-604):

http://esbd.tbpc.state.tx.us/1380/sagency.cfm

TxDOT can mail a printed copy of the RFQ/RFP if a request is received by fax to (512) 416-3080 or at the Dallas District Headquarters, 4777 E Highway 80, Mesquite, Texas 75150-6643, Telephone (214) 320-6113 or FAX (214) 320-6117.

DEADLINE: Sealed proposals must be received and time stamped by Monday, September, 25, 2006 at 2:30 PM, local time at the Texas Department of Transportation, Dallas District Headquarters, 4777 E Highway 80, Mesquite, Texas 75150-6643, ATTN: Tim Powers.

TRD-200603817
Bob Jackson
Interim General Counsel
Texas Department of Transportation
Filed: July 19, 2006

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).